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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-232

PACIFIC FIDELITY LIFE INSURANCE CO. and BANKERS MORTGAGE COMPANY OF CALIFORNIA,
Petitioners,

v.

DAVID DEVOTO and CHARLES F. VOLK,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JAMES R. MADISON
600 Montgomery Street
San Francisco, CA 94111
Counsel for Petitioners

ORRICK, HERRINGTON, ROWLEY & SUTCLIFFE
WILLIAM F. ALDERMAN
ROBERT P. FEYER
600 Montgomery Street
San Francisco, CA 94111
Of Counsel for Petitioners

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SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	3
Statement of the Case	5
Reasons for Granting the Writ	8
1. The Decision Below Conflicts With the Decisions of Other Courts of Appeals and Creates Unsound New Doctrine as to the Antitrust Significance of Business Dealings Among Affiliated Corporations	8
2. The Decision Below Conflicts With the Decisions of Other Courts of Appeals as to the Proper Scope of "the Business of Insurance," an Important Question of Interpretation Under the McCarran-Ferguson Act	15
3. The Decision Below Conflicts With the Decisions of Other Courts of Appeals as to Standing to Sue for Injury to a Relationship With an Alleged Antitrust Target	20
Conclusion	24
Appendix A (Opinion of the District Court)	
Appendix B (Original Opinion of the Court of Appeals)	
Appendix C (Modified Opinion of the Court of Appeals)	
Appendix D (Complaint)	

CITATIONS

Cases	Pages
Ace Beer Distributors, Inc. v. Kohn, Inc., 318 F.2d 283 (6th Cir. 1963), *cert. denied,* 375 U.S. 922, 84 S.Ct. 267 (1963), *reh. denied,* 375 U.S. 982, 84 S.Ct. 479 (1963)	9, 10
Addrisi v. Equitable Life Assurance Society of the United States, 503 F.2d 725 (9th Cir. 1974), *cert. denied,* ..... U.S. ....., 95 S.Ct. 1590 (1975)	16, 18
Albrecht v. Herald Company, 390 U.S. 145, 88 S.Ct. 869 (1968), *reh. denied,* 390 U.S. 1018, 88 S.Ct. 1258 (1968)	9
Alpha Distributing Co. of California, Inc. v. Jack Daniel Distillery, 454 F.2d 442 (9th Cir. 1972), *cert. denied,* ..... U.S. ....., 95 S.Ct. 74 (1974)	12
Ark Dental Supply Co. v. Cavitron Corp., 461 F.2d 1093 (3d Cir. 1972)	11
Bushie v. Stenocord Corp., 460 F.2d 116 (9th Cir. 1972)	12
Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971), *cert. denied,* 406 U.S. 930, 92 S.Ct. 1776 (1972)	22
California League of Independent Insurance Producers v. Aetna Casualty & Surety Co., 175 F.Supp. 857 (N.D. Cal. 1959)	19
Chicago Title Insurance Co. v. Great Western Financial Corp., 69 Cal.2d 305, 70 Cal.Rptr. 849, 444 P.2d 481 (1968)	12
Commander Leasing Co. v. Transamerica Title Insurance Co., 477 F.2d 77 (10th Cir. 1973)	18
Dipson Theatres, Inc. v. Buffalo Theatres, Inc., 190 F.2d 951 (2d Cir. 1951), *cert. denied,* 342 U.S. 926, 72 S.Ct. 363 (1952)	12

Pages

Federal Trade Commission v. Consolidated Foods Corp., 380 U.S. 592, 85 S.Ct. 1220 (1965) 13
Federal Trade Commission v. National Casualty Co., 357 U.S. 560, 78 S.Ct. 1260 (1958) 20

Hawaii v. Standard Oil Co. of California, 405 U.S. 251, 92 S.Ct. 885 (1972) 24

International Salt Co. v. United States, 332 U.S. 392, 68 S.Ct. 12 (1947) 13

Joseph E. Seagram & Sons, Inc., v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), *cert. denied,* 396 U.S. 1062, 90 S.Ct. 752 (1970), *reh. denied,* 397 U.S. 1003, 90 S.Ct. 1113 (1970) 9

Kauffman v. Dreyfus Fund, Inc., 434 F.2d 727 (3d Cir. 1970), *cert. denied,* 401 U.S. 974, 91 S.Ct. 1190 (1971) 23
Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc. 340 U.S. 211, 71 S.Ct. 259 (1951) 11
Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S.Ct. 705 (1959) 9

Melrose Realty Co. v. Loew's, Inc., 234 F.2d 518 (3d Cir. 1956), *cert. denied,* 352 U.S. 890, 77 S.Ct. 128 (1956) 22
Miley v. John Hancock Mutual Life Insurance Co., 148 F.Supp. 299 (D. Mass. 1957), *aff'd per curiam,* 242 F.2d 758 (1st Cir. 1957), *cert. denied,* 355 U.S. 828, 78 S.Ct. 38 (1957) 19, 22
Mulvey v. Samuel Goldwyn Productions, 433 F.2d 1073 (9th Cir. 1970), *cert. denied,* 402 U.S. 923, 91 S.Ct. 1377 (1971) 21, 22

Pages

Nationwide Auto Appraiser Service, Inc., v. Association of Casualty & Surety Companies, 382 F.2d 925 (10th Cir. 1967) 23

Northern Pacific Railway Co. v. United States, 356 U.S. 1, 78 S.Ct. 514 (1958) 13, 14

Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418 (D.C. Cir. 1957), *cert. denied,* 355 U.S. 822, 78 S.Ct. 29 (1957), *reh. denied,* 355 U.S. 900, 78 S. Ct. 259 (1957) 9

Page v. Work, 290 F.2d 323 (9th Cir. 1961), *cert. denied,* 368 U.S. 875, 82 S.Ct. 121 (1961) 23

Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 82 S.Ct. 486 (1962) 9

Productive Inventions v. Trico Products Corp., 224 F.2d 678 (2d Cir. 1955), *cert. denied,* 350 U.S. 936, 76 S.Ct. 301 (1956) 22

Reibert v. Atlantic Richfield Co., 471 F.2d 727 (10th Cir. 1973), *cert. denied,* 411 U.S. 938, 93 S.Ct. 1900 (1973), *reh. denied,* 412 U.S. 914, 93 S.Ct. 2289 (1973) 23

SCM Corporation v. Radio Corporation of America, 407 F.2d 166 (2d Cir. 1969), *cert. denied,* 395 U.S. 943, 89 S.Ct. 2014 (1969) 22

Securities and Exchange Commission v. National Securities Inc., 393 U.S. 453, 89 S.Ct. 564 (1968) 15, 17-20

Simpson v. Union Oil Company of California, 377 U.S. 13, 84 S.Ct. 1051) (1964) 9

Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F.2d 341 (9th Cir. 1969) 10

Syracuse Broadcasting Corp. v. Newhouse, 319 F.2d 683 (2d Cir. 1963) 12

Pages

Timken Roller Bearing Co. v. United States, 341 U.S. 593, 71 S.Ct. 971 (1951) 11

Travelers Insurance Co. v. Blue Cross of Western Pennsylvania, 481 F.2d 80, (3d Cir. 1973), *cert. denied,* 414 U.S. 1093, 94 S.Ct. 724 (1973) 20

United States v. Arnold, Schwinn & Co., 388 U.S. 365, 87 S.Ct. 1856 (1967) 9

United States v. Columbia Steel Co., 334 U.S. 495, 68 S.Ct. 1107 (1948) 10

United States v. Parke, Davis & Co., 362 U.S. 29, 80 S.Ct. 503 (1960) 9

United States v. Yellow Cab Co., 332 U.S. 218, 67 S.Ct. 1560 (1947) 11

Volasco Products Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383 (6th Cir. 1962), *cert. denied,* 372 U.S. 907, 83 S. Ct. 721 (1963) 23

STATUTES

15 U.S.C. § 1 (Sherman Act § 1) 2, 3, 5, 8-14, 21

15 U.S.C. § 15 (Clayton Act § 4) 3, 5, 20-21

15 U.S.C. §§ 1011 et seq. (McCarran-Ferguson Act) 3, 7, 15-20

15 U.S.C. §§ 1012 16

15 U.S.C. §§ 1013 (b) 16

28 U.S.C. § 1254 (1) 2

California Business and Professions Code

§ 16600 ..... 4, 10

§ 16720 ..... 4, 10

§ 16726 ..... 4, 10

§ 16750 ..... 4, 10

California Insurance Code

§ 790 ..... 4, 10

§ 790.01 ..... 5, 10

Pages

ARTICLES

Parsons, "Developments in the Doctrine of Intra-Enterprise Conspiracy," 39 *Antitrust L.J.* 968 (1970).... 13

Willis & Pitofsky, "Antitrust Consequences of Using Corporate Subsidiaries," 43 *N.Y.U.L.Rev.* 20 (1968) 12, 14

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DAVID DEVOTO and CHARLES F. VOLK,
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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

The petitioners, Pacific Fidelity Life Insurance Company ("Pacific") and Bankers Mortgage Company of California ("Bankers"), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 15, 1975.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of California is reported at 354 F.Supp.

874 (1973) and appears in Appendix A hereto. The original opinion of the United States Court of Appeals for the Ninth Circuit is unreported and appears in Appendix B hereto. The modified opinion of the Court of Appeals for the Ninth Circuit is reported unofficially at 1975 CCH Trade Cases ¶ 60,132 and appears in Appendix C hereto.

JURISDICTION

The original opinion of the United States Court of Appeals for the Ninth Circuit, reversing the summary judgment entered in favor of petitioners by the district court, was entered on January 16, 1975. On January 29, 1975, the court of appeals entered an order extending until February 13, 1975 the time within which a petition for rehearing might be filed. Petitioners filed a timely petition for rehearing and suggestion for rehearing in banc on February 13, 1975. On May 15, 1975, the court of appeals entered an order denying the petition for rehearing and rejecting the suggestion for a rehearing in banc, an order withdrawing the original opinion and stating that a revised opinion would be filed in its place, and a revised opinion in accordance with the latter order. Judgment was entered on May 15, 1975. This petition is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether it is a violation of section 1 of the Sherman Act for a corporation to enter into a contract with an affiliated corporation in preference to a substantially similar contract with an "outside" corporation, when no further anti-competitive motive or effect is alleged or shown.

2. Whether a claim of restraint on competition among insurers is within the "business of insurance" under the McCarran-Ferguson Act.

3. Whether an insurance agent has standing to sue for an antitrust violation allegedly directed at an insurer from which the agent expected to receive commissions.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 15

§ 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

§ 15. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

§ 1011. The Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

§ 1012. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the

purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* that [the Sherman Act, the Clayton Act and the Federal Trade Commission Act] shall be applicable to the business of insurance to the extent that such business is not regulated by state law.

California Business and Professions Code

§ 16600. Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade or business of any kind is to that extent void.

§ 16720. A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes:

(a) To create or carry out restrictions in trade or commerce....

§ 16726. Except as provided in this chapter, every trust is unlawful, against public policy and void.

§ 16750. (a) Any person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter [§§ 16700-16758, regarding combinations in restraint of trade], may sue therefor in any court having jurisdiction in the county where the defendant resides or is found, or any agent resides or is found, or where service may be obtained, without respect to the amount in controversy, and to recover three times the damages sustained by him, and shall be awarded a reasonable attorneys' fee together with the costs of suit. . . .

California Insurance Code

§ 790. The purpose of this article [the California Unfair Trade Practices Act] is to regulate trade practices in

the business of insurance in accordance with the intent of Congress as expressed in [the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 et seq.], by defining, or providing for the determination of, all such practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

§ 790.01. This article applies to . . . agents, brokers . . . as well as all other persons engaged in the business of insurance.

STATEMENT OF THE CASE

This action involves two contractual relationships, one between petitioners Pacific and Bankers, the other between Bankers and American Home Assurance Company ("American"). The complaint (Appendix D to this petition) alleges that Pacific and Bankers conspired to tortiously interfere with the Bankers-American contract by contracting with each other. Although respondents DeVoto and Volk were strangers to both contracts, they claim that they were injured because they expected to receive commissions from American in the event American realized income from its contract with Bankers. Respondents claim that petitioners' conduct was a violation of section 1 of the Sherman Act by virtue of the fact that both petitioners were subsidiaries of the same parent, Transamerica Corporation. Respondents invoked federal jurisdiction over their Sherman Act claim under 15 U.S.C. § 15 and based a second claim for tortious interference with contract upon the doctrine of pendent jurisdiction.

Petitioner Bankers is a California corporation engaged primarily in the business of making FHA-VA loans to single-family homebuyers secured by mortgages. Petitioner Pacific is a California corporation engaged primarily in

the business of selling life, accident and health insurance. One aspect of Pacific's business is the insuring of borrowers against death and/or disability in an amount sufficient to guarantee the payment of the borrower's loan. In the case of mortgagors, such insurance is commonly known as "mortgage protection insurance."

In 1964 petitioners entered into an agreement with each other whereby Pacific agreed to pay Bankers an agent's commission on any mortgage protection insurance sold by Pacific to Bankers' customers in exchange for Bankers' cooperation with Pacific in direct-mail solicitation and servicing of policies. Pacific regularly solicited Bankers' customers pursuant to the agreement through 1967, and Bankers received commissions on sales of insurance generated by those solicitations.

In January 1968, Bankers entered into an agreement with American similar to its agreement with Pacific. The primary differences were that only accident and health insurance were included in the American plan and American agreed to pay Bankers an advance commission of $1.25 for each eligible Bankers borrower solicited by American. Appendix D at 38. It was primarily the prospect of this immediate income which induced Bankers to consider acting as agent for a second insurer, notwithstanding its reluctance to have two insurance companies soliciting its borrowers in the name of Bankers (R 234-35).

Respondents DeVoto and Volk, doing business as Market Placement Agency, were responsible for bringing Bankers and American together (R 235). However, they played no role in developing the American plan or in soliciting Bankers customers, nor were they parties to the Bankers-American agreement (R 235). It was Bankers which was to perform the functions of an agent under the agreement.

Appendix D at 38-42. Respondents, like Bankers, expected to be compensated by American on a commission basis, and they had a separate agreement with American covering those terms (R 235).

American contemplated making its first solicitation of Bankers' customers in October 1968. Appendix D at 39. In April 1968, Pacific informed Bankers that it felt it could achieve better results than American, agreed to match the $1.25 per borrower advance commission offered by American, and urged Bankers to let Pacific make the mass mailing contemplated by American (R 236). Pacific also pointed out to Bankers that all profits would thereby stay within the Transamerica corporate group (R 259). In June 1968, Bankers informed American that it had decided to accept Pacific's offer, mentioning pressure from Pacific as one of the reasons (R 236).

Respondents filed this action in July 1970, after the statute of limitations had run on a claim for tortious interference with contract. In April 1972, petitioners moved for summary judgment on the grounds that the federal courts lacked jurisdiction in view of the McCarran-Ferguson Act and the lack of any effect on interstate commerce, that respondents lacked standing to sue, and that petitioners' alleged tortious interference with contract did not constitute a violation of the antitrust laws (R 231 et seq.).

In January 1973, the district court granted petitioners' motion for summary judgment on the grounds that petitioners' alleged conduct did not take place in or affect interstate commerce and did not in any event violate the antitrust laws. Appendix A. Respondents appealed. The court of appeals reversed and remanded for trial, holding that the district court had erred in dismissing the action and that the McCarran and standing issues were not before it on appeal. Appendix B. Following a petition for rehearing,

the court of appeals issued a revised opinion summarily affirming the district court's rulings on the McCarran and standing issues. Appendix C. Rehearing in banc was denied and judgment for respondents was entered in May 1975.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts with the Decisions of Other Courts of Appeals and Creates Unsound New Doctrine as to the Antitrust Significance of Business Dealings Among Affiliated Corporations

Review by this Court of the decision of the court of appeals is of critical importance for all corporations which deal in any way with or through subsidiaries. The court of appeals has held, for the first time in any case of which petitioners are aware, that it may be anticompetitive for a corporation, *without more,* to deal with an affiliate rather than with an "outside" corporation.

The facts alleged in the complaint are not complex. Respondents allege that Pacific learned of the existence of the Bankers-American contract and, using its position as a subsidiary of Transamerica Corporation, secured a substantially similar contract with Bankers. Nothing more than the corporate affiliation between Bankers and Pacific was alleged as the basis for converting a lost business opportunity, for which state law provided an adequate remedy, into a violation of section 1 of the Sherman Act. Appendix D at 36. Nor did the facts advanced by the parties in support of cross-motions for summary judgment before the district court add anything to the conduct alleged in the complaint. There was no allegation or evidence of monopolistic practices, boycott, price fixing, misuse of market power, or any other activity or motive which might lend anticompetitive significance to this intra-corporate dealing. Thus the basic antitrust issue in this case

is presented to the Court in unusually pure form: does the Sherman Act proscribe dealing between non-competing corporate affiliates, to the detriment of an "outside" competitor of one of the affiliates, when no other anticompetitive motive or effect is alleged?

At the outset, it is settled that a businessman may choose with whom he wishes to conduct business and terminate or refuse to deal with existing or potential business partners. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 376, 87 S.Ct. 1856 (1967).[1] It is not a violation of section 1 for the businessman to "conspire" with the successful competitors of a customer or supplier who is being disfavored,[2] even in the case where a breach of contract or other tortious interference with business is thereby induced. *Ace Beer Distributors, Inc. v. Kohn, Inc.*, 318 F.2d 283 (6th Cir. 1963), *cert. denied*, 375 U.S. 922, 84 S.Ct. 267 (1963), *reh. denied*, 375 U.S. 982, 84 S.Ct. 479 (1963). A plaintiff cannot, by charging a conspiracy, turn what is basically a claim of violation of state law into a federal antitrust case.

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1. A refusal to deal can, of course, constitute a violation of the antitrust laws where combined with an anticompetitive purpose or effect, as when used to enforce resale price maintenance [*United States v. Parke, Davis & Co.*, 362 U.S 29, 80 S.Ct. 503 (1960); *Albrecht v. Herald Company*, 390 U.S. 145, 88 S.Ct. 869 (1968), *reh. denied*, 390 U.S. 1018, 88 S.Ct. 1258 (1968)], enforce price-fixing agreements [*Simpson v. Union Oil Company of California*, 377 U.S. 13, 84 S.Ct. 1051 (1964)], enforce territorial restrictions [*United States v. Arnold, Schwinn & Co., supra*], carry out group boycotts to drive a company out of business [*Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S.Ct. 705 (1959)], or create a monopoly [*Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 82 S.Ct. 486 (1962)]. No such intent or effect was alleged or shown by respondents.

2. *E.g., Joseph E. Seagram & Sons, Inc., v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062, 90 S.Ct. 752 (1970), *reh. denied*, 397 U.S. 1003, 90 S.Ct. 1113 (1970); *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 822, 78 S.Ct. 29 (1957), *reh. denied*, 355 U.S. 900, 78 S.Ct. 259 (1957).

Ace Beer Distributors, Inc. v. Kohn, Inc., supra, 318 F.2d at 286; *Sun Valley Disposal Co. v. Silver State Disposal Co.,* 420 F.2d 341, 343 (9th Cir. 1969).

The court of appeals in the present case, while acknowledging the above principles, held that the addition of one single factor—Bankers' possible desire to keep its cooperation with mortgage insurers within the Transamerica corporate group—created an issue of fact requiring trial on a possible section 1 violation. This ruling is contrary to proper and judicially-approved interpretations of the "intra-corporate conspiracy" doctrine and threatens to seriously disrupt future business activities of corporations which use subsidiaries.

This Court has discussed the validity of intra-corporate dealings against Sherman Act attack in two leading cases. In *United States v. Columbia Steel Co.,* 334 U.S. 495, 68 S.Ct. 1107 (1948), the government challenged an acquisition whose admitted purpose was to use the acquired company as a market for steel produced by the acquiring company and its subsidiaries. The government's theory was that the acquisition would foreclose competitors of the parent from supplying the acquired company's steel requirements. After first noting that the integrated structure of the alleged conspirators did not insulate them from the Sherman Act, the Court acknowledged that in all probability a corporate subsidiary will deal only with its affiliates for goods the affiliates can furnish. That fact, however, does not establish illegality. It is only when other elements of Sherman Act violation are present that the fact of corporate relationship becomes material and can be considered in determining whether a restraint of trade exists. 334 U.S. at 523. Concluding that vertical integration without more is not illegal, 334 U.S. at 525, and that acquisition of a firm outlet to

absorb production reflects a normal business purpose, 334 U.S. at 533, the Court held that the acquisition was not illegal under the Sherman Act.

Similarly in *United States v. Yellow Cab Co.*, 332 U.S. 218, 67 S.Ct. 1560 (1947), the government charged that a manufacturer of taxicabs required cab operating companies which it acquired to buy cabs from the parent. Explaining its conclusion that the test of illegality is the presence or absence of an unreasonable restraint and not the fact of corporate affiliation, the Court stated:

> The corporate interrelationships of the conspirators, in other words, are not determinative of the applicability of the Sherman Act. That statute is aimed at substance rather than form. 332 U.S. at 227.

The Court should now announce explicitly the implication of its earlier decisions on intra-corporate dealing: that while the fact of corporate affiliation will not insulate companies from antitrust scrutiny,[3] it does not of itself *create* antitrust liability when, in the absence of the corporate affiliation, none would exist. Such a conclusion has been drawn by courts of appeals and by a leading State court in direct conflict with the decision below.

In *Ark Dental Supply Co. v. Cavitron Corp.*, 461 F.2d 1093 (3d Cir. 1972), the court held on facts virtually identical to those here that the termination of a contract between a manufacturer and distributor of electro-surgery equipment did not violate the Sherman Act where the manufacturer made a decision to have all distribution made by a division of its corporate parent, and the manufacturing subsidiary and division were not competitors.

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3. *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598, 71 S.Ct. 971 (1951); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215, 71 S.Ct. 259 (1951).

In *Dipson Theatres, Inc. v. Buffalo Theatres, Inc.*, 190 F.2d 951 (2d Cir. 1951), *cert. denied*, 342 U.S. 926, 72 S.Ct. 363 (1952), the court stated that it was not illegal for movie distributors to favor their subsidiary theaters over "outside" theaters in the distribution of movies, and that such actions were to be expected. *Cf., Bushie v. Stenocord Corp.*, 460 F.2d 116 (9th Cir. 1972); *Alpha Distributing Co. of California, Inc. v. Jack Daniel Distillery*, 454 F.2d 442 (9th Cir. 1972), *cert. denied*, ... U.S. ....., 95 S.Ct. 74 (1974); *Syracuse Broadcasting Corp. v. Newhouse*, 319 F.2d 683 (2d Cir. 1963).

The Supreme Court of California held that a complaint alleging facts similar to those in the present case did not state a claim under California's version of the Sherman Act in *Chicago Title Insurance Co. v. Great Western Financial Corp.*, 69 Cal.2d 305, 70 Cal.Rptr. 849, 444 P.2d 481 (1968). Plaintiff insurance company alleged that it was unable to get insurance business given to its competitors by their affiliated financial corporations. The court cited this Court's opinions in *Columbia Steel* and *Yellow Cab* for the proposition that there is substantial justification for affiliated corporations to do business with each other and held that it could not be unreasonable for a corporate parent to require its subsidiaries to deal with each other as long as the very corporate structure does not violate the antitrust laws. 69 Cal.2d at 316, 324.

The same conclusion is also reached by leading commentators on the problem of intra-enterprise activity:

> . . . [I]f a restraint [of trade] can be made out from nothing more than internal corporate coordination that gives rise to an adverse effect on outsiders, we reject the notion that such actions constitute, or ought to constitute, a violation of section 1. First, the concept is so vague that it would be virtually impossible to provide comprehensible notice to businessmen

of what they may or may not do. The consequence would be substantial deterrence of resort to incorporated subsidiaries—assuming the doctrine were enforced—and a minimum of notice as to the limits of permissible business conduct.

Another major failing in this concept of expanded antitrust liability is that there are no discernible limits upon its application. Any cooperation or coordination between components of a multi-corporate enterprise can adversely affect the trade of outsiders if those outsiders happen to be suppliers, customers, or competitors of the corporate unit. Willis & Pitofsky, "Antitrust Consequences of Using Corporate Subsidiaries," 43 *N.Y.U.L. Rev.* 20, 48 (1968). *See,* Parsons, "Developments in the Doctrine of Intra-Enterprise Conspiracy," 39 *Antitrust L.J.* 968, 971 (1970).

The great mischief of the court of appeals' decision below results from its facile use of quotations from this Court's decisions in a reciprocity case[4] and two tying cases,[5] in which agreements giving a defendant "a priority on the business at equal prices" were held to violate the antitrust laws. The court's attempt to expand tying and reciprocity doctrine into the unrelated subject of dealing with affiliates is conceptually unsound and disastrous in its results.

The vice in each of the three cases relied upon by the court of appeals, as in all reciprocity and tying cases, was that a defendant had used its power as a buyer (in the case of reciprocity) or seller (in the case of tying) in the market for one product to coerce buyers of an unrelated product to buy from the defendant at equal prices. It is the seller's *market power* in an unrelated product intruding on a buy-

4. *Federal Trade Commission v. Consolidated Foods Corp.*, 380 U.S. 592, 85 S.Ct. 1220 (1965).

5. *International Salt Co. v. United States*, 332 U.S. 392, 68 S.Ct. 12 (1947); *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 78 S.Ct. 514 (1958).

er's freedom of choice which is regarded as "an irrelevant and alien factor" in tying and reciprocity cases. *Northern Pacific Railway Co. v. United States, supra,* 356 U.S. at 11. In the present case, however, there is no question of market power coercion. Unlike all the tying and reciprocity cases, the present case involves only one product and market and is thereby conceptually similar to the cases regarding distributors and refusals to deal.

The decision below, by its loose citation of language from reciprocity and tying cases, suggests that businessmen are required to exclude all subjective factors from their selection of suppliers or customers and examine only the objective criteria of price and quality, on penalty of facing Sherman Act liability. The use of any subjective criteria—such as a preference to deal with old customers, or local companies, or affiliated companies—inevitably limits the opportunity for "outsiders" to obtain this particular business. Yet the decision below would appear to brand any such preferential criterion as an "alien factor" and force a trial to determine Sherman Act liability, even when no other anticompetitive motive or effect is alleged. Such a result is burdensome, irrational, and contrary to established judicial interpretations. Even if limited to the narrow factual situation of affiliated companies, the results will be harmful given the great number of American corporations which do business with or through separately incorporated subsidiaries. *See generally,* Willis & Pitofsky, *supra,* 43 *N.Y.U.L.Rev.* 20 (1968).

The Court should grant certiorari in this case in order to clarify and make consistent the Sherman Act standards for dealings among affiliated companies, and in order to prevent the great confusion and disruption in normal business relations which is likely to result from the ruling below.

2. The Decision Below Conflicts with the Decisions of Other Courts of Appeals as to the Proper Scope of "The Business of Insurance," an Important Question of Interpretation Under the McCarran-Ferguson Act

One of petitioners' jurisdictional defenses throughout this action has been that the federal courts lack jurisdiction because the McCarran-Ferguson Act[6] exempts "the business of insurance" from the purview of the Sherman Act when that business, as here, is regulated by applicable state law. The district court rejected the McCarran defense, stating that the activity challenged by respondents was "peripheral to the insurance business." 354 F.Supp. at 876-77; Appendix A at 4. The court cited this Court's opinion in *Securities and Exchange Commission v. National Securities, Inc.*[7] in support of its conclusion. The court of appeals' revised opinion affirmed that ruling without analysis "for the reasons stated by the district court." Appendix C at 26.

This petition seeks review of the ruling below on the McCarran issue for the following reasons: (1) the district court and court of appeals misinterpreted and went well beyond the Court's opinion in *National Securities;* (2) the ruling of the court of appeals is in conflict with holdings of courts of appeals for the First, Third, Ninth and Tenth Circuits and of numerous district courts; (3) the complaint itself and the uncontroverted record demonstrate that the activities challenged by respondents are in the "business of insurance" and are fully regulated by California law; and (4) the proper scope of the McCarran Act exemption from the Sherman Act is an important question of law which should be decided by the Court.

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6. 15 U.S.C. §§ 1011 *et seq.*

7. 393 U.S. 453, 89 S.Ct. 564 (1968).

Alleged violations of the Sherman Act involving the "business of insurance" are outside the jurisdiction of the federal courts where applicable state law regulates the business of insurance,[8] as long as the action is not based upon "boycott, coercion or intimidation."[9] There is no doubt that the Cartwright Act (California's "little Sherman Act") and the California Insurance Unfair Trade Practices Act[10] regulate the business of insurance in the manner required by the McCarran Act. *Addrisi v. Equitable Life Assurance Society of the United States,* 503 F.2d 725 (9th Cir. 1974), *cert. denied,* ..... U.S. ....., 95 S.Ct. 1590 (1975). Likewise, it is not contended that this case fits within the "boycott, coercion or intimidation" exception to the McCarran Act exemption.

The only question raised by respondents and the courts below is whether the activities alleged in the complaint involved "the business of insurance." The complaint itself leaves no doubt as to respondents' view of this question. Paragraph 9 alleges that petitioners restrained commerce in "the business of buying, selling and servicing mortgage protection assurance" (R 3, Appendix D at 36). Paragraph 11 alleges that petitioners' acts "constituted a combination and conspiracy and restraint of trade and commerce in the business of selling mortgage protection insurance in California in violation of Section 1 of the Sherman Act" (R 4, Appendix D at 36-37). The contract between Bankers and American, attached as "Exhibit A" to the complaint, is entitled "Mortgage Agency Agreement" and establishes

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8. 15 U.S.C. § 1012.

9. 15 U.S.C. § 1013(b).

10. Business & Professions Code §§ 16600 *et seq.* and Insurance Code §§ 790 *et seq.* respectively, both of which are set out under the "statutory provisions involved" heading above.

Bankers as an agent of American for the purpose of negotiating American's plan of mortgage protection insurance, for which Bankers as agent is to procure a license as insurance agent or broker, collect and receipt premiums, receive commissions, remit accounts and payments, and prepare monthly reports (R 6, Appendix D at 38-42). The "Agents Agreement" between Bankers and Pacific contains similar provisions (R 239-45).

The only reason given by the courts below for rejection of the clear meaning of the above portions of the complaint and record is a conclusory citation of *National Securities, supra.* There the Securities and Exchange Commission brought a 10b-5 action alleging a fraudulent merger scheme whereby the acquiring company failed to tell shareholders that they would be paying part of the cost of acquisition of their company. The acquiring company raised a McCarran Act defense, and the Court granted certiorari because of the importance to the administration of the securities laws of the question whether state laws aimed at protecting the interests of those who own securities in insurance companies are the type of laws referred to in the McCarran Act. 393 U.S. at 458.

The Court held the McCarran Act inapplicable because the state laws at issue were concerned with securities regulation, not insurance regulation. In the portion of its opinion relied on by the courts below in the present case the Court stated:

> Certainly the fixing of rates is part of this business [of insurance] . . . . The selling and advertising of policies . . . and the licensing of companies and their agents . . . are also within the scope of the statute [the McCarran Act]. Congress was concerned with the type of state regulation that centers around the contract of insurance . . . . The relationship between insurer and

> insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. 393 U.S. at 460.

It appears that the decision below could have rested on two possible interpretations of *National Securities*. In either case, however, the interpretation is at odds with that made by other courts of appeals and is contrary to the plain wording of the McCarran Act.

The court below may have believed that Bankers was not in the business of insurance because its main business is mortgage lending. It is clear, however, that both Pacific and American were negotiating for Bankers' services as an insurance agent and that Pacific and American were competing as insurers. In any event, the McCarran Act does not require that all parties be solely engaged in the business of insurance. *Addrisi v. Equitable Life Assurance Society of the United States, supra,* 503 F.2d at 727 [tying of homeowner loans to insurance is within the "business of insurance"]; *Commander Leasing Co. v. Transamerica Title Insurance Co.,* 477 F.2d 77, 86 (10th Cir. 1973) [abstract companies acting as agents are within the "business of insurance"].

More likely, the court below believed that the focus of *National Securities* upon the relationship between insurer and policyholder meant that the McCarran Act does not exempt claims of restraint of competition between insurers. To this view there are several answers. Unlike the situation in *National Securities*, the state statutes involved in the present case, both on their face and in the unanimous view of the courts which have reviewed them, regulate

competition in the business of insurance. The complaint alleges that petitioners restrained trade in the sale of insurance policies from insurers to insured mortgage borrowers and in the relationship between insurance companies and their agents. The services and fees of insurance agents are intimately related to the rates paid by policyholders and to the policies and services which they receive. *California League of Independent Insurance Producers v. Aetna Casualty & Surety Co.*, 175 F.Supp. 857, 860 (N.D. Cal. 1959).

Moreover, the Court in *National Securities* expressly recognized that it was not establishing an exclusive list of activities which are within the "business of insurance." 393 U.S. at 460. Alleged restraints on competition among insurers are obvious candidates for the list in view of the facts (1) that competition is the fundamental concern of the antitrust laws and (2) that the federal antitrust laws are applicable to the business of insurance only to the extent that the business is not regulated by applicable state law. 15 U.S.C. § 1012(b).

Two courts of appeals have upheld summary judgments for defendants under the McCarran Act where plaintiffs alleged that illegal activities by insurers restrained their ability to obtain insurance sales or commissions. In *Miley v. John Hancock Mutual Life Insurance Co.*, 148 F.Supp. 299, 301-302 (D. Mass. 1957), *aff'd per curiam*, 242 F.2d 758 (1st Cir. 1957), *cert. denied*, 355 U.S. 828, 78 S.Ct. 38 (1957), the court of appeals affirmed a district court holding that the McCarran Act exempted from Sherman Act consideration an alleged conspiracy among several insurers and members of a state employees' group insurance commission to deprive the company for which plaintiff was an agent of a contract to provide insurance to state employees. The district court had expressly deferred to a state statute

regulating unfair methods of competition among insurance companies. 148 F.Supp. at 302.

In *Travelers Insurance Co. v. Blue Cross of Western Pennsylvania,* 481 F.2d 80, 82-83 (3rd Cir. 1973), *cert. denied,* 414 U.S. 1093, 94 S.Ct. 724 (1973), the court relied on *National Securities* in concluding that allegedly illegal contracts between Blue Cross and hospitals, prescribing the amounts and terms by which Blue Cross would pay the hospitals for services rendered to Blue Cross subscribers, were within the business of insurance. Plaintiff insurer complained that such illegal contracts placed it in a disadvantageous position in soliciting health insurance policies. The court held that the district court had properly dismissed the action under the McCarran Act.

The above decisions of courts of appeals for the First, Third, Ninth and Tenth Circuits are in direct conflict with the court of appeals' decision in the present case. They indicate an entirely different view of the Court's decision in *National Securities* than that taken by the court of appeals here. The importance of interpretation of the McCarran Act is a ground properly recognized by the Court in granting certiorari. *Federal Trade Commission v. National Casualty Co.,* 357 U.S. 560, 562, 78 S.Ct. 1260 (1958). The proper scope of "the business of insurance" is at the very heart of the McCarran Act and should not be left in the ambiguous state created by the existing conflict among the circuits.

3. The Decision Below Conflicts with the Decisions of Other Courts of Appeals as to Standing to Sue for Injury to a Relationship with an Alleged Antitrust Target

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that a treble-damage action may be brought by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . ." The "by

reason of" element of section 4 limits the class of persons having standing to sue for alleged injury under the antitrust laws.

Petitioners contend that respondents lack standing to sue under the antitrust laws because their complaint does not allege any violation of the Sherman Act directed at them. Rather, respondents' theory is that petitioners violated the antitrust laws by virtue of the abrogation of a contract between Bankers and American and the subsequent formation of a substantially similar agreement between Bankers and Pacific. Respondents claim they were injured because they expected to receive commissions from American in the event that American realized income from its contract with Bankers. Appendix D.

The district court rejected the standing defense in reliance on the Ninth Circuit decision in *Mulvey v. Samuel Goldwyn Productions*, 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923, 91 S.Ct. 1377 (1971). Appendix A at 4-5. The court of appeals initially ruled that the standing issue was not before it (Appendix B at 14), but in its revised opinion stated simply that it agreed with the district court that the standing issue was controlled by *Mulvey*. Appendix C at 26.

The question of standing in circumstances such as those presented here has been a recurring problem in decisions of the courts of appeals. The issue has focused upon doctrinal labels applied to two tests generally recognized as the opposite ends of the standing spectrum: the "target area" test, of which the Ninth Circuit is a leading exponent, and the "direct injury" test which prevails in the majority of circuits. While the labels tend in practice to become somewhat indistinct,[11] it is nevertheless apparent that

11. For example, the Ninth Circuit in *Mulvey* announced a "foreseeability of injury" test of standing, but it relied upon the

most of the courts of appeals treat very differently than did the court here the question of standing of "those who have suffered economic damage by virtue of their relationships with 'targets' or with participants in an alleged antitrust conspiracy, rather than by being 'targets' themselves." *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., supra,* 454 F.2d at 1295.

In *Calderone,* the court of appeals for the Second Circuit denied standing to a non-operating landlord of motion picture theaters used by the tenant exhibitor in furtherance of a conspiracy which allegedly reduced plaintiff's profits from the lease. The same result was reached by the Third Circuit on similar facts in *Melrose Realty Co. v. Loew's, Inc.,* 234 F.2d 518 (3d Cir. 1956), *cert. denied,* 352 U.S. 890, 77 S.Ct. 128 (1956).

In two cases, the Second Circuit denied standing to patent licensors whose royalties were allegedly diminished by antitrust violations involving licensees. *SCM Corporation v. Radio Corporation of America,* 407 F.2d 166 (2d Cir. 1969), *cert. denied,* 395 U.S. 943, 89 S.Ct. 2014 (1969); *Productive Inventions v. Trico Products Corp.,* 224 F.2d 678 (2d Cir. 1955), *cert. denied,* 350 U.S. 936, 76 S.Ct. 301 (1956).

In *Miley v. John Hancock Mutual Life Ins. Co.,* 148 F. Supp. 299 (D.Mass. 1957), *aff'd per curiam,* 242 F.2d 758 (1st Cir. 1957), *cert. denied,* 355 U.S. 828, 78 S.Ct. 38 (1957), the court affirmed a denial of standing on facts *identical* to those in the present case. The facts set forth

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fact that plaintiff was himself a party to a contract with defendant and was "squarely hit," 433 F.2d at 1076; in a leading Second Circuit decision, *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.,* 454 F.2d 1292 (2d Cir. 1971), *cert. denied,* 406 U.S. 930, 92 S.Ct. 1776 (1972), the court held that a plaintiff who was not an immediate victim of the alleged violation was not within the "target area."

in the opinion of the district court show that plaintiff insurance agent alleged injury because of lost commissions resulting from an alleged antitrust conspiracy which caused the insurer from which commissions would have been received to lose the contract.

In *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727 (3d Cir. 1970), *cert. denied*, 401 U.S. 974, 91 S.Ct. 1190 (1971), standing was denied to a shareholder of an antitrust target. In *Reibert v. Atlantic Richfield Co.*, 471 F.2d 727 (10th Cir. 1973), *cert. denied*, 411 U.S. 938, 93 S.Ct. 1900 (1973), *reh. denied*, 412 U.S. 914, 93 S.Ct. 2289 (1973), standing was denied to employees who lost their jobs as a result of the allegedly illegal acquisition of their former employer. *See also, Nationwide Auto Appraiser Service, Inc. v. Association of Casualty & Surety Companies*, 382 F.2d 925 (10th Cir. 1967) [franchisor lacks standing]; *Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 394-95 (6th Cir. 1962), *cert. denied*, 372 U.S. 907, 83 S.Ct. 721 (1963) [supplier lacks standing].

The above cases are in direct conflict with both the rationale and the result in the decision below. The error of the decision is further shown by the lengths to which the court of appeals went to find that petitioners' alleged activities might have affected interstate commerce. Unable to find that such activities substantially affected the interstate commerce of *respondents'* business, as required by its previous decisions,[12] the court instead indicated that there was a possible effect on the interstate conduct of *American's* business as a basis for reversing the district court's ruling that the interstate commerce requirement of section 1 was not met. Appendix C at 28-29. By focusing on the

12. *E.g., Page v. Work*, 290 F.2d 323, 330 (9th Cir. 1961), *cert. denied*, 368 U.S. 875, 82 S.Ct. 121 (1961); *Sun Valley Disposal Co. v. Silver State Disposal Co., supra*, 420 F.2d at 343.

business of American as the ground of its interstate commerce ruling, the court below merely emphasized respondents' lack of standing to sue for alleged injury to American.

In each of the cases discussed above, certiorari was sought and was denied by the Court. The time has come for resolution of the important and recurring question of the standing of those who claim damage by virtue of relationships with antitrust targets or participants. The ripeness of this issue for resolution by the Court is particularly apparent in the light of the Court's citation of many of the above cases in *Hawaii v. Standard Oil Co. of California,* 405 U.S. 251, 263 n. 14, 92 S.Ct. 885 (1972), for the proposition that:

> The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

James R. Madison
600 Montgomery Street
San Francisco, CA 94111
Counsel for Petitioners

Orrick, Herrington, Rowley & Sutcliffe
William F. Alderman
Robert P. Feyer
600 Montgomery Street
San Francisco, CA 94111
Of Counsel for Petitioners

August 12, 1975

(Appendices Follow)

Appendix A

In the United States District Court
for the Northern District of California

Original Filed Jan 29 1973

Clerk of U.S. Dist. Court
San Francisco

No. C-70-1509 SW

DAVID DEVOTO and CHARLES S. VOLK,
Plaintiffs,

v.

PACIFIC FIDELITY LIFE INSURANCE COMPANY and BANKERS MORTGAGE COMPANY OF CALIFORNIA,
Defendants.

MEMORANDUM AND JUDGMENT

Plaintiffs brought this private civil action under Section 4 of the Clayton Act (15 U.S.C. 15) alleging injury through violations of Section 1 of the Sherman Act (15 U.S.C. 1). The two defendants (Pacific Fidelity Life Insurance Company and Bankers Mortgage Company of California) have moved for summary judgment on four separate grounds pursuant to Rule 56 of the Federal Rules of Civil Procedure. Plaintiffs have moved for summary judgment on the issue of liability.

Defendant Bankers Mortgage [Bankers] is in the business of making real estate loans secured by mortgages.

Defendant Pacific Fidelity Life Insurance Company [Pacific Fidelity] sells life, accident, and health insurance throughout the United States. Both defendants were subsidiaries of Transamerica Corporation at all times relevant to this action.

One aspect of Pacific Fidelity's business is the sale of mortgage protection insurance. Basically, this is insurance sold to a mortgagor to insure the payment of his mortgage in the event he dies or is disabled. Bankers does not itself sell mortgage protection insurance to its customers but will assist an insurance company in either of two ways. It will supply the insurance company with the names of its customers and/or will cooperate with it in a direct mail solicitation of its mortgagors. In exchange for these services, Bankers receives either commissions on mortgage protection insurance sold to its customers or a flat fee per name supplied.

In 1967 and 1968, Defendant Pacific Fidelity had an exclusive agreement with Defendant Bankers relative to the above described services. At this same time Plaintiff Devoto was conducting business under the name of Market Placement Agency. Market Placement was engaged in the business of providing special insurance programs to businesses throughout the western United States and Plaintiff Charles Volk was employed by it as a general agent. Late in 1967, Volk contacted Bankers and offered a new mortgage protection insurance solicitation plan on behalf of American Home Assurance Company which, among other things, provided for the payment of one dollar and twenty-five cents ($1.25) for each customers' name supplied by Bankers. Bankers was impressed with the plan and elected to enter into a contract with American Home and to cease dealing

exclusively with Pacific Fidelity. Bankers also agreed to cooperate with American Home in a direct mail solicitation of its mortgagors. The contract between Bankers and American Home was signed in January 1968.

Undaunted by this turn of events Pacific Fidelity made Bankers a new offer in April 1968 closely resembling the American Home plan, in which they sought to replace American Home and make the mass mail solicitation that American Home had planned with Bankers' cooperation for the fall of 1968.

In June 1968, Bankers informed American Home that they had decided to accept Pacific Fidelity's offer and to abrogate the agreement with American Home. The ensuing "supplemental" agreement executed by Pacific Fidelity and Bankers provided Bankers a flat rate of $1.25 per name and contains numerous other features similar to the abrogated American Home agreement.

In considering this motion for summary judgment, the court must look at the record in the light most favorable to the non-moving party and determine whether genuine issues as to material facts exists for determination by the trier of fact. If there are no genuine issues of material fact in dispute, the court may enter judgment as a matter of law.

The four separate bases for defendants' Rule 56 motion hereafter separately discussed are:

1) The McCarran-Ferguson Act insurance business exemption.

2) Plaintiffs' lack of standing to sue.

3) Absence of any allegations showing acts in or having any effect upon interstate commerce; and

4) Absence of any allegations indicating acts having anti-competitive effect or purpose.

McCARRAN-FERGUSON ACT

The McCarran-Ferguson Act [15 U.S.C. 1011 *et seq.*] provides that the "business of insurance" will be regulated by state law and, in the absence of coercion, intimidation, or boycott, will not be subject to the federal antitrust laws. Thus, defendants reason, since their actions took place within "the business of insurance," it is beyond the reach of these plaintiffs in this court. The defendants' business activity attacked in the complaint is merely peripheral to the insurance business. In essence, Pacific Fidelity and American Home were competing for a list of Bankers' customers and defendants cite no relevant authority for their position that the McCarran-Ferguson Act exempts *this* type of activity from the Sherman and Clayton Acts.

The role of insurance in our complex commercial society is pervasive. Insurance companies with their policies, their agents, and their customers touch and concern all commercial activity. The McCarran-Ferguson Act did not purport to make state legislation supreme in regulating all the activities of insurance *companies.* It does allow the state to regulate the *business* of insurance [*Securities Exchange Commission v. National Securities, Inc.,* 393 U.S. 453, 459 (1968)][1] but such business is not the subject of this litigation.

STANDING

Defendants' assertion that plaintiffs lack of standing to sue is without merit. Contrary to their argument, the Ninth

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1. *S.E.C. v. National, supra,* points out that the relationship between insurer and insured, the type of policy issued, its reliability, interpretation and enforcement are the core of the "business of insurance." The focus of the statutory term was on the relationship between the insurance company and the policy holder. 393 U.S. 458, 460 (1968).

Circuit recognized a private cause of action for persons foreseeably, albeit incidentally, harmed by antitrust violations that cause direct injury to a third party. *Mulvey v. Samuel Goldwyn Productions,* 433 F.2d 1073 (9th Cir. 1970), *cert. denied,* 402 U.S. 923 (1971). Plaintiffs Volk and Devoto were substantially and foreseeably affected by Bankers' abrogation of its agreement with American Home.

INTERSTATE COMMERCE

Defendants vigorously deny plaintiffs allegations that their conduct was directly in or affected interstate commerce. The court agrees.

The complaint and affidavit accompanying this motion show both plaintiffs to be residents of California. Defendants Pacific Fidelity Bankers Home [*sic*], and plaintiffs' employer Market Placement are all California businesses with their principal places of business in California. Defendants uncontroverted affidavit states that all communications between the plaintiffs and all communications between Pacific Fidelity and Bankers occurred in California. American Home with general offices in New York City is admitted to have had interstate communications with Bankers but, as shown below, this fact does not provide Sherman Act jurisdiction.

Two tests are used to determine whether business activity involves interstate commerce: (1) whether the activity complained of occurred within the flow of interstate commerce or (2) whether the acts complained of, while intrastate, substantially affected interstate commerce. *Las Vegas Merchant Plumbers Association v. United States,* 210 F.2d 732, 739-740 n.3 (9th Cir. 1954). In the Ninth Circuit, the

question is not whether the acts complained of affected a *business* engaged in interstate commerce but whether the acts affected *the interstate commerce part of the business. Sun Valley Disposal Co. v. Silver State Disposal Co.,* 420 F.2d 341, 343 (9th Cir. 1969). The court thus must consider whether the acts of Defendants Pacific Fidelity and/or Bankers, which are the subject matter of this action, were in or substantially affected interstate commerce. The fact that the business of mortgage protection insurance involves and substantially affects interstate commerce is irrelevant to this question.

The acts of the defendants were conducted primarily in California. While it is true that notification of Bankers' intent to breach its agreement with American Home was interstate, this is not the substance of the plaintiffs' action. The other actions of the defendants were essentially intrastate. Pacific Fidelity's attempts to induce Bankers to breach the agreement with American Home took place in California. All agreements between Pacific Fidelity and Bankers originated and were consummated in California. This activity therefore cannot be said to have been directly in the flow of interstate commerce. *Cartrade, Inc. v. Ford Dealers Adv. Assn. of Southern California,* 446 F.2d 289 (9th Cir. 1971).

Of course, liability is not contingent on the activity being directly "in" interstate commerce; it is sufficient that the activity substantially affect interstate commerce. Defendants argue that the breach did not substantially affect interstate commerce; indeed, it is their contention that the breach had *no* effect on interstate commerce.

The complaint and the affidavits before this court indicate that the intended consumers of the insurance programs,

Bankers' mortgagors, were in California.[2] Even if this were not so, the insurance program eventually offered to customers by Pacific Fidelity was essentially the same insurance that American Home had planned to offer. Plaintiffs have not indicated that the number of customers who purchased the mortgage protection insurance under the new Pacific Fidelity program was a substantial increase or decrease from the number who would have purchased the same program from American Home. Accordingly, since the court cannot assume that a change in insurance companies offering the same policy would greatly effect the number of policies eventually sold, there is no basis for believing that the acts of the defendants have had any, much less a substantial, effect on interstate commerce. The Ninth Circuit rule set out in *Cartrade, Inc. v. Dealers Adv. Assn. of Southern California, supra,* compels this court to grant defendants' motion for summary judgment.

ANTI-COMPETITIVE EFFECT OR PURPOSE

Even had this court found the necessary interstate activity defendants' motion for summary judgment must still be granted. The alleged activity of Pacific Fidelity and Bankers is, as a matter of law, beyond the purview of Section 1 of the Sherman Act.

For the purposes of this action, Bankers was a mere supplier of names. They sold their customer list. Pacific Fidelity had been buying these lists since 1964. In 1968 American Home offered to buy the list from Bankers and Bankers

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2. In his opposition to this motion and in oral argument, plaintiff's counsel represented to the court that some of Bankers' customers were in Nevada. However, this unsworn statement did not indicate a percentage, was not supported by affidavits and cannot be considered under Rule 56 of the F.R.Civ.P.

found their offer more attractive than the existing arrangement with Pacific Fidelity. Pacific Fidelity, realizing it had been outbid for the list, made another offer to Bankers in an effort to save the contract. This second Pacific offer was strikingly similar to the American Home package and Bankers, for reasons of their own which are not relevant here, decided to resume its exclusive arrangement with Pacific Fidelity.

Competition in the sale of mortgage protection insurance and in the sale of the customer list was hardly restrained. On the contrary, there was an offer and counter-offer process that convinced Pacific Fidelity to revamp its mortgage protection insurance program with Bankers and to rebid for the customer list and Bankers' cooperation. Unfortunately for the plaintiffs and American Home, Pacific Fidelity was successful and regained the contract. The court points out that American Home was free to offer its mortgage insurance plan to Bankers' customers. Possession of the customer list and cooperation from Bankers in a direct mail solicitation would certainly have been helpful to American Home but the list merely facilitated the sale of insurance and its loss cannot be said to have foreclosed the possibility of their sale of insurance to Bankers' mortgagors by American Home.

Plaintiffs cite *Flinkote Co. v. Lysfjord,* 246 F.2d 368 (9th Cir. 1957) for the premise that an anticompetitive effect or purpose resulting from the refusal to deal with American Home is unlawful. *Flinkote* presented a clearly different situation than the instant case; in that case, there was evidence of a common scheme among plaintiff's competitors to drive him out of business by boycott. There has been no suggestion that Pacific Fidelity, a competitor, and Bankers, a noncompetitor, entered into a scheme to drive American Home

out of the mortgage insurance business in California. Neither does the record show that Bankers and Pacific Fidelity were attempting to fix prices on the insurance policies. No allegation has been made and no affidavits have been offered to show that Bankers "tied" the sale of Pacific Fidelity's insurance to the mortgage dealings with their customers. Plaintiffs' cited authority dealing with "tying" arrangements must be disregarded.

This case is closely analogous to the 'refusal to deal" antitrust cases. The critical question is not whether there was a refusal to deal (or an inducement, or combination, to refuse to deal), but rather, whether the refusal to deal is so anticompetitive in purpose or effect as to be an unreasonable restraint of trade. *Alpha Distributing Co. of Calif. v. Jack Daniel Distillery,* 454 F.2d 442 (9th Cir. 1972), citing *Joseph Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.,* 416 F.2d 71 (9th Cir. 1969); *Walker Distributing Company v. Lucky Lager Brewing Co.,* 323 F.2d 1 (9th Cir. 1963). The court finds that there are no genuine issues of material fact concerning the transaction between the parties. The record does not indicate that the anticompetitive effect, if any, that might have resulted unreasonably restrained trade. Bankers' motive for breaching the agreement with American Home was based on business reasons. Pacific Fidelity, spurred by American Home's bidding, revamped its old mortgage insurance package and matched American Home's offer. The court does not find either of these motives, nor the effect of the defendants' acts, to constitute an unreasonable restraint of trade under the rule of *Alpha Distributing Co.* and *Hawaiian Oke, supra.*

This court need not, and does not, express any opinions on the merits of possible state causes of action in tort or contract that might lie as a result of the defendants' actions.

For the reasons stated above, defendants' motion for summary judgment is hereby granted and plaintiffs' motion for partial summary judgment on the issue of liability is denied.

It is so ordered.

Dated: January 26, 1973.

/s/ SPENCER WILLIAMS

UNITED STATES DISTRICT JUDGE

Appendix B

United States Court of Appeals
for the Ninth Circuit

Filed Jan 16 1975
Clerk, U.S. Court of Appeals

No. 73-1685

DAVID DEVOTO and CHARLES F. VOLK,
Plaintiffs-Appellants,

vs.

PACIFIC FIDELITY LIFE INSURANCE CO. and
BANKERS MORTGAGE COMPANY OF CALIFORNIA,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California

Before: CHOY and GOODWIN, Circuit Judges, and
BEEKS,* District Judge

OPINION

BEEKS, District Judge:

Appellants appeal from an order of the district court granting summary judgment of dismissal. They allege a violation of Section 1 of the Sherman Act.[1] The court concluded that the acts complained of did not affect interstate commerce or manifest an anticompetitive purpose or effect.

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*The Honorable William T. Beeks, Senior United States District Judge for the Western District of Washington, sitting by designation.

1. 15 U.S.C. § 1.

Appellee Bankers Mortgage Company of California (hereinafter "Bankers") is in the business of making real estate loans in California and Nevada.[2] Appellee Pacific Fidelity Life Insurance Co. (hereinafter "Pacific") sells life, health and accident insurance throughout the United States. At all times relevant to this action both appellees were subsidiaries of the Transamerica Corporation.

One aspect of Pacific's business is the sale to mortgagors of mortgage protection insurance that guarantees payment of the mortgage in the event of the death or disability of the mortgagor. Bankers does not sell mortgage protection insurance, but in 1967 and 1968 it had an exclusive arrangement with Pacific whereby it supplied Pacific with a list of its mortgagors and cooperated in their direct mail solicitation. In exchange for these services, Bankers received commissions on mortgage protection policies sold by Pacific to Bankers' mortgagors.

During this period appellant DeVoto was conducting business under the name of Market Placement Agency. Market Placement provided special insurance programs to businesses throughout the Western United States. Appellant Volk was employed by it as a general agent. Late in 1967 Volk contacted Bankers and offered a new mortgage protection solicitation plan on behalf of American Home Assurance Company of New York (hereinafter "American"). The plan provided for the payment of $1.25 for each mortgagor's name supplied by Bankers, in addition to commissions on policies sold. Bankers accepted the plan and elected to sign a two-year contract with American and to cease dealing on an exclusive basis with Pacific. Appel-

2. In 1968 Bankers was the eighth largest mortgage banker in the United States (R. 322).

lants were to receive commissions on insurance policies sold by American to Bankers' mortgagors.

American has its principal place of business in New York, and the contract contemplated that Bankers' mortgagors in California and Nevada would be serviced by American from its East Coast offices. Whereas Pacific offered life, health and accident insurance in the mortgage protection field, American offered only health and accident insurance. Under the post-1968 arrangement, therefore, Bankers' customers would potentially be receiving solicitation from both Pacific and American.

Disconcerted over the loss of its exclusive arrangement with Bankers, Pacific sought to match the American package and to persuade Bankers to reinstate the exclusive relationship. It met American's offer of $1.25 per name supplied, but there is some question as to whether Bankers would realize an equal amount in commissions with Pacific since the alleged facts suggest that, on the basis of past records, American enjoyed considerably better market penetration than did Pacific. That is, for a given number of names supplied by Bankers, American could expect to sell more insurance policies than could Pacific.

In any event, Pacific persuaded Bankers to abrogate its contract with American, and to return to its exclusive arrangement with Pacific. Pacific agreed to hold Bankers harmless against any liability arising out of Bankers' abrogation of the agreement with American. Appellees assert that the decision to abrogate the American contract was reached on the basis of pure business considerations. Appellants claim that the decision was made in consideration of the corporate relationship between Bankers and Pacific, and a desire to keep the business of mortgage protection insurance within the Transamerica "family."

Appellants brought this action under the jurisdictional grant of Section 4 of the Clayton Act,[3] alleging that the action of Bankers and Pacific manifests a combination in restraint of trade in violation of Section 1 of the Sherman Act. Appellees subsequently moved for summary judgment on the grounds that (1) the activities complained of occurred within the business of insurance, and thus are exempted from the antitrust laws by virtue of the McCarran-Ferguson Act,[4] (2) appellants lack standing to sue, (3) the acts complained of were not in, nor did they affect interstate commerce, nor did they (4) manifest an anticompetitive purpose or effect.

The district court ruled in favor of appellants on the first two issues, finding that the acts complained of were peripheral to the "business of insurance" and thus without the protective scope of McCarran-Ferguson; and that appellants were within the target area of the alleged antitrust violation and thus have standing to sue. These rulings are not before us on this appeal.

Summary judgment was granted on the basis of the two remaining issues: the court ruled that the acts complained of neither occurred in nor affected interstate commerce, and that they did not manifest an anticompetitive purpose or effect. We disagree.

I.

Jurisdiction under Section 1 of the Sherman Act exists only if the acts complained of occur within the flow of, or substantially affect interstate commerce.[5] Moreover, "the

3. 15 U.S.C. § 15.

4. 15 U.S.C. § 1011 *et seq.*

5. *Las Vegas Merchant Plumbers Ass'n v. United States*, 210 F.2d 732 (9th Cir.), *cert. denied*, 348 U.S. 817 (1954).

test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business.'"[6]

Appellees place much reliance on the fact that Bankers, Pacific and appellants are all residents of California, that the communications leading to the alleged combination all occurred within California, and that the mortgagors purchasing insurance under the contracts at issue are all residents of California.[7] Appellees argue that these substantial intrastate connections preclude a finding that the alleged combination occurred within the flow of or affected interstate commerce.

We do not reach the issue of whether the alleged violations occurred in interstate commerce. Our conclusion, set forth below, that the acts complained of substantially affect interstate commerce is sufficient to uphold jurisdiction under the Sherman Act and require setting aside the contrary ruling of the district court.

The court below found itself to be without jurisdiction on the basis of its finding that the insurance solicitation program ultimately submitted by Pacific was essentially the same as that offered by American, and that there was no evidence that substitution of Pacific for American would have any impact on the number of policies sold to Bankers'

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6. *Page v. Work,* 290 F.2d 323, 330 (9th Cir.), *cert. denied,* 368 U.S. 875 (1961).

7. It appears, however, that appellees' assertion that all of Bankers' mortgagors are located in California is not supported by the record. The evidence suggests that 93.4% of Bankers' mortgagors are located in California and that the remainder are located in Nevada. Determination of this factual issue is not essential to our decision on this appeal. On remand, however, the district court should reconsider its finding that Bankers' mortgagors are exclusively Californians.

mortgagors. The court consequently found our holding in *Cartrade, Inc. v. Ford Dealers Adv. Ass'n of Southern California,*[8] to require the conclusion that the alleged combination did not affect interstate commerce. The district court's reliance on *Cartrade* is misplaced.

The plaintiff in *Cartrade* was a company that arranged trades of Ford automobiles among members of the Ford Dealers Advertising Association of Southern California. When a customer desired a model that a particular dealer did not have in stock, the dealer would contact Cartrade who, for a fee, would consult its computer listings of all cars held in stock by member dealers and would advise the inquiring dealer of any other member dealers having in stock the requested model. The dealers could then exchange automobiles to their mutual benefit. The procedure assisted dealers to serve customers who desired a specific model and did not wish to wait while such a car was ordered and delivered from an out-of-state assembly plant. Cartrade enjoyed an exclusive relationship with member Ford dealers and was provided by Ford with the necessary computerized inventory listings.

This relationship was terminated by the Dealers Association, and Ford thereafter declined to supply Cartrade with the computer listings. Cartrade was thereby forced out of business, and it subsequently filed suit under Sections 1 and 2 of the Sherman Act.[9] This court upheld dismissal of the suit because, *inter alia,* the alleged activities did not affect interstate commerce. It was reasoned that the removal of Cartrade and the substitution of its successor might better serve the business interests of the dealers. Cartrade

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8. 446 F.2d 289 (9th Cir. 1971), *cert. denied,* 405 U.S. 997 (1972).

9. 15 U.S.C. §§ 1, 2.

could not show that the substitution would hurt Ford auto sales or result in the importation of fewer Ford cars into California. Cartrade's business itself was purely local, and interstate commerce in Ford cars could not be shown to be affected by the substitution of a successor car trader for Cartrade.

Cartrade is thus distinguishable from the present case in one critical respect: whereas in *Cartrade* the termination of local business relations did not affect the flow of interstate commerce, in the instant case the combination between Bankers and Pacific worked effectively to foreclose American from a significant segment of the California market for mortgage protection insurance. It essentially terminated the interstate flow of mortgagor lists, insurance policies, premiums and information with respect to Bankers' mortgagors.

Interstate insurance transactions fall within the definition of interstate commerce as that term is applied pursuant to federal antitrust regulation,[10] and "[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."[11]

II.

The district court held that the alleged acts of appellees did not manifest an anticompetitive purpose or effect, and, as a matter of law, were beyond the purview of Section 1 of the Sherman Act. The court found that Bankers abrogated its contract with American and resumed its exclusive

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10. *See, United States v. South-Eastern Underwriters Asso.*, 322 U.S. 533 (1944). Certain exemptions not relevant here are legislated in the McCarran-Ferguson Act, *supra* note 3.

11. *United States v. Women's Sportswear Manufacturing Association*, 336 U.S. 460, 464 (1949).

relationship with Pacific "for business reasons," and "for reasons of their own which are not relevant here."

Viewing the evidence as a whole and the inferences which may be drawn therefrom in the light most favorable to appellants, as we must,[12] the record clearly supports the contentions that (1) the American package was equal if not superior to that finally offered by Pacific, and (2) that Bankers based its decision to abrogate the American contract and to resume its exclusive relationship with Pacific upon its desire to keep the business of mortgage protection insurance within the Transamerica corporate group. So viewed, the record reveals anticompetitive conduct falling within the proscriptive sweep of Section 1 of the Sherman Act.

In *FTC v. Consolidated Foods Corp.*[13] the FTC invoked Section 7 of the Clayton Act[14] to challenge Consolidated's acquisition of Gentry, Inc. Consolidated was a large manufacturer of processed foods, and Gentry was a manufacturer of dehydrated onion and garlic. Consolidated purchased numerous food products from suppliers who were, in turn, purchasers of dehydrated onion and garlic. The Supreme Court upheld the finding of the Commission that the effect of the acquisition "may be substantially to lessen competition."[15] In practical terms, Consolidated would be able to exert the considerable leverage manifest in its purchasing power to coerce its suppliers to buy from Gentry, the Consolidated subsidiary. The Court observed that

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12. *Consolidated Electric Co. v. United States,* 355 F.2d 437 (9th Cir. 1966).

13. 380 U.S. 592 (1965).

14. 15 U.S.C. § 18.

15. 380 U.S. at 593.

> "... the 'reciprocity' made possible by such an acquisition is one of the congeries of anticompetitive practices at which the antitrust laws are aimed. The practice results in 'an irrelevant and alien factor,' ... intruding into the choice among competing products, creating at the least 'a priority on the business at equal prices.' "[16]

Likewise, in *International Salt Co. v. United States*,[17] a reciprocal arrangement under which International leased certain of its patented machines on the condition that the lessees would use therein only International's products, was found to violate the Sherman Act even though International agreed to meet the prices offered by competing suppliers. Again, the Court noted the anticompetitive effect of an agreement that gave the defendant a priority on the business at equal prices.[18]

If, as alleged, Pacific had only to match the package offered by American to induce Bankers to abrogate the American contract, then Pacific enjoyed a priority on the business at equal prices. This priority is attributed to its corporate relationship with Bankers. This relationship is a factor over which an outsider such as American has no control, and with which it cannot hope to compete. It is a factor unrelated to traditional competitive elements such as product price, quality and marketability. It is an "irrelevant and alien factor" that, when allowed to intrude into the free marketplace, produces an anticompetitive effect such as the antitrust laws were designed to combat.[19]

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16. 380 U.S. at 594.

17. 332 U.S. 392 (1947).

18. *See also, Northern Pac. R. Co. v. United States*, 356 U.S. 1 (1958).

19. *FTC v. Consolidated Foods Corp., supra* note 12.

Appellees urge that our holding in *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*[20] is to the contrary. In that case a liquor distributor that enjoyed an exclusive contract to distribute the products of the defendant distillers was terminated, and the distribution rights were contracted to another. Several of the defendant distillers were members of the multicorporation "Seagram group." It was alleged by the plaintiff therein that defendants conspired to take his business away from him in violation of Section 1 of the Sherman Act. This court disagreed, holding that absent anticompetitive intent, termination of a distributor is a proper business option. We held that the alleged conspiracy, the negotiations between the several distillers and the new distributor, was designed merely to ascertain and insure that the proposed distribution system would be viable. We concluded that there was no unreasonable restraint of trade.

The *Seagram* case may, however, be distinguished from the case before us. In *Seagram* there was no breach of contract. An existing contract was simply allowed to expire. This is relevant to our determination in *Seagram* that traditional competitive factors led to the termination: there was no evidence suggesting that any factors other than traditional business considerations were weighed pursuant to reaching the decision to change distributors. Neither plaintiff therein nor the defendant distributor was a member of the Seagram corporate family. There was thus no suggestion that the termination was effected for the purpose of keeping the distribution business within the Seagram group. In *Seagram* we did not consider that issue.

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20. 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062, *reh. denied*, 397 U.S. 1003 (1970).

The view of the evidence most favorable to appellants here suggests that Pacific had achieved a priority on the business at equal prices as a result of its corporate affiliation with Bankers. Consequently, an issue of fact is presented as to whether the American contract was abrogated in consideration of this anticompetitive element, or, alternatively, in consideration of factors properly cognizable in the free market system. In light of the existence of this factual issue, summary dismissal was improvidently granted.

Reversed, and remanded for further proceedings in accordance herewith.

Appendix C

United States Court of Appeals
for the Ninth Circuit

OPINION

[May 15, 1975]

Before: CHOY and GOODWIN, Circuit Judges,
and BEEKS,* District Judge.

BEEKS, District Judge:

Appellants appeal from an order of the district court granting summary judgment of dismissal. They allege a violation of Section 1 of the Sherman Act.[1] The court concluded that the acts complained of did not affect interstate commerce or manifest an anticompetitive purpose or effect.

Appellee Bankers Mortgage Company of California (hereinafter "Bankers") is in the business of making real estate loans in California and Nevada.[2] Appellee Pacific Fidelity Life Insurance Co. (hereinafter "Pacific") sells life, health and accident insurance throughout the United States. At all times relevant to this action both appellees were subsidiaries of the Transamerica Corporation.

One aspect of Pacific's business is the sale to mortgagors of mortgage protection insurance that guarantees payment of the mortgage in the event of the death or disability of the mortgagor. Bankers does not sell mortgage protection insurance, but in 1967 and 1968 it had an exclusive arrange-

*The Honorable William T. Beeks, Senior United States District Judge for the Western District of Washington, sitting by designation.

1. 15 U.S.C. § 1.

2. In 1968 Bankers was the eighth largest mortgage banker in the United States (R. 322).

ment with Pacific whereby it supplied Pacific with a list of its mortgagors and cooperated in their direct mail solicitation. In exchange for these services, Bankers received commissions on mortgage protection policies sold by Pacific to Bankers' mortgagors.

During this period appellant DeVoto was conducting business under the name of Market Placement Agency. Market Placement provided special insurance programs to businesses throughout the Western United States. Appellant Volk was employed by it as a general agent. Late in 1967 Volk contacted Bankers and offered a new mortgage protection solicitation plan on behalf of American Home Assurance Company of New York (hereinafter "American"). The plan provided for the payment of $1.25 for each mortgagor's name supplied by Bankers, in addition to commissions on policies sold, Bankers accepted the plan and elected to sign a two-year contract with American and to cease dealing on an exclusive basis with Pacific. Appellants were to receive commissions on insurance policies sold by American to Bankers' mortgagors.

American has its principal place of business in New York, and the contract contemplated that Bankers' mortagagors in California and Nevada would be serviced by American from its East Coast offices. Whereas Pacific offered life, health and accident insurance in the mortgage protection field, American offered only health and accident insurance. Under the post-1968 arrangement, therefore, Bankers' customers would potentially be receiving solicitation from both Pacific and American.

Disconcerted over the loss of its exclusive arrangement with Bankers, Pacific sought to match the American package and to persuade Bankers to reinstate the exclusive relationship. It met American's offer of $1.25 per name supplied, but there is some question as to whether Bankers

would realize an equal amount in commissions with Pacific since the alleged facts suggest that, on the basis of past records, American enjoyed considerably better market penetration than did Pacific. That is, for a given number of names supplied by Bankers, American could expect to sell more insurance policies, and thereby generate more commissions, than could Pacific.

In any event, Pacific persuaded Bankers to abrogate its contract with American, and to return to its exclusive arrangement with Pacific. Pacific agreed to hold Bankers harmless against any liability arising out of Banker's abrogation of the agreement with American. Appellees assert that the decision to abrogate the American contract was reached on the basis of pure business considerations. Appellants claim that the decision was made in consideration of the corporate relationship between Bankers and Pacific, and in response to pressure to keep the business of mortgage protection insurance within the Transamerica "family."

Appellants brought this action under the jurisdictional grant of Section 4 of the Clayton Act,[3] alleging that the action of Bankers and Pacific manifests a combination in restraint of trade in violation of Section 1 of the Sherman Act. Appellees subsequently moved for summary judgment on the grounds that (1) the activities complained of occured within the business of insurance, and thus are exempted from the antitrust laws by virtue of the McCarran-Ferguson Act,[4] (2) appellants lack standing to sue, (3) the acts complained of were not in, nor did they affect interstate commerce, nor did they (4) manifest an anticompetitive purpose or effect.

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3. 15 U.S.C. § 15.

4. 15 U.S.C. § 1011 *et seq.*

The district court ruled in favor of appellants on the first two issues, finding that the acts complained of were peripheral to the "business of insurance" and thus without the protective scope of McCarran-Ferguson; and that appellants were within the target area of the alleged anti-trust violation and thus have standing to sue. These rulings are affirmed for the reason stated by the district court.[5]

Summary judgment was granted on the basis of the two remaining issues: the court ruled that the acts complained of neither occurred in nor affected interstate commerce, and that they did not manifest an anticompetitive purpose or effect. We disagree.

I.

Jurisdiction under Section 1 of the Sherman Act exists only if the acts complained of occur within the flow of, or substantially affect interstate commerce.[6] Moreover, "the test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business."[7]

Appellees place much reliance on the fact that Bankers, Pacific and appellants are all residents of California, that the communications leading to the alleged combination all occurred within California, and that the mortgagors purchasing insurance under the contracts at issue are all resi-

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5. The district court found the standing issue to be controlled by *Mulvey v. Samuel Goldwyn Productions*, 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971), and the McCarran-Ferguson issue by *Securities Exchange Commission v. National Securities, Inc.*, 393 U.S. 453 (1968). We agree.

6. *Las Vegas Merchant Plumbers Ass'n. v. United States*, 210 F.2d 732 (9th Cir.), *cert. denied*, 348 U.S. 817 (1954).

7. *Page v. Work*, 290 F.2d 323, 330 (9th Cir.), *cert. denied*, 368 U.S. 875 (1961).

dents of California.[8] Appellees argue that these substantial intrastate connections preclude a finding that the alleged combination occurred within the flow of or affected interstate commerce.

We do not reach the issue of whether the alleged violations occurred in interstate commerce. Our conclusion, set forth below, that the acts complained of substantially affect interstate commerce is sufficient to uphold jurisdiction under the Sherman Act and require setting aside the contrary ruling of the district court.

The court below found itself to be without jurisdiction on the basis of its finding that the insurance solicitation program ultimately submitted by Pacific was essentially the same as that offered by American, and that there was no evidence that substitution of Pacific for American would have any impact on the number of policies sold to Bankers' mortgagors. The court consequently found our holding in *Cartrade, Inc. v. Ford Dealers Adv. Ass'n of Southern California,*[9] to require the conclusion that the alleged combination did not affect interstate commerce. The district court's reliance on *Cartrade* is misplaced.

The plaintiff in *Cartrade* was a company that arranged trades of Ford automobiles among members of the Ford Dealers Advertising Association of Southern California. When a customer desired a model that a particular dealer

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8. It appears, however, that appellees' assertion that all of Bankers' mortgagors are located in California is not supported by the record. The evidence suggests that 93.4% of Bankers' mortgagors are located in California and that the remainder are located in Nevada. Determination of this factual issue is not essential to our decision on this appeal. On remand, however, the district court should reconsider its finding that Bankers' mortgagors are exclusively Californians.

9. 446 F.2d 289 (9th Cir. 1971), *cert. denied*, 405 U.S. 997 (1972).

did not have in stock, the dealer would contact Cartrade who, for a fee, would consult its computer listing of all cars held in stock by member dealers and would advise the inquiring dealer of any other member dealers having in stock the requested model. The dealers could then exchange automobiles to their mutual benefit. The procedure assisted dealers to serve customers who desired a specific model and did not wish to wait while such a car was ordered and delivered from an out-of-state assembly plant. Cartrade enjoyed an exclusive relationship with member Ford dealers and was provided by Ford with the necessary computerized inventory listings.

This relationship was terminated by the Dealers Association, and Ford thereafter declined to supply Cartrade with the computer listings. Cartrade was thereby forced out of business, and it subsequently filed suit under Sections 1 and 2 of the Sherman Act.[10] This court upheld dismissal of the suit because, *inter alia,* the alleged activities did not affect interstate commerce. It was reasoned that the removal of Cartdade and the substitution of its successor might better serve the business interests of the dealers. Cartrade could not show that the substitution would hurt Ford auto sales or result in the importation of fewer Ford cars into California. Cartrade's business itself was purely local and interstate commerce in Ford cars could not be shown to be affected by the substitution of a successor car trader for Cartrade.

Cartrade is thus distinguishable from the present case in one critical respect: whereas in *Cartrade* the termination of local business relations did not affect the flow of interstate commerce, in the instant case the combination between Bankers and Pacific worked effectively to foreclose Ameri-

10. 15 U.S.C. §§ 1, 2.

can from a significant segment of the California market for mortgage protection insurance. It essentially terminated the interstate flow of mortgagor lists, insurance policies, premiums and information with respect to Bankers' mortgagors.

Interstate insurance transactions fall within the definition of interstate commerce as that term is applied pursuant to federal antitrust regulation,[11] and "[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."[12]

II

The district court held that the alleged acts of appellees did not manifest an anticompetitive purpose or effect, and, as a matter of law, were beyond the purview of Section 1 of the Sherman Act. The court found that Bankers abrogated its contract with American and resumed its exclusive relationship with Pacific "for business reasons," and "for reasons of their own which are not relevant here."

Viewing the evidence as a whole and the inferences which may be drawn therefrom in the light most favorable to appellants, as we must,[13] the record clearly supports the contentions that (1) the American package was superior to that finally offered by Pacific, and (2) Bankers based its decision to abrogate the American contract and to resume its exclusive relationship with Pacific upon its desire to keep the business of mortgage protection insurance within the

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Transamerica corporate group. So viewed, the record reveals possible anticompetitive conduct which may fall within the proscriptive sweep of Section 1 of the Sherman Act.

In *FTC v. Consolidated Foods Corp.*,[14] the FTC invoked Section 7 of the Clayton Act[15] to challenge Consolidated's acquisition of Gentry, Inc. Consolidated was a large manufacturer of processed foods, and Gentry was a manufacturer of dehydrated onion and garlic. Consolidated purchased numerous food products from suppliers who were, in turn, purchasers of dehydrated onion and garlic. The Supreme Court upheld the finding of the Commission that the effect of the acquisition "may be substantially to lessen competition."[16] In practical terms, Consolidated would be able to exert the considerable leverage manifest in its purchasing power to coerce its suppliers to buy from Gentry, the Consolidated subsidiary. The Court observed that

> "... the 'reciprocity' made possible by such an acquisition is one of the congeries of anticompetitive practices at which the antitrust laws are aimed. The practice results in 'an irrelevant and alien factor,' ... intruding into the choice among competing products, creating at the least 'a priority on the business at equal prices.'"[17]

Likewise, in *International Salt Co. v. United States*,[18] a reciprocal arrangement under which International leased certain of its patented machines on the condition that the lessees would use therein only International's products, was found to violate the Sherman Act even though International

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14. 380 U.S. 592 (1965).
15. 15 U.S.C. § 18.
16. 380 U.S. at 593.
17. 380 U.S. at 594.
18. 332 U.S. 392 (1947).

agreed to meet the prices offered by competing suppliers. Again, the Court noted the anticompetitive effect of an agreement that gave the defendant a priority on the business at equal prices.[19]

If, as alleged, Pacific was able, because of its corporate relationship with Bankers, to induce Bankers to abrogate the American contract without having to offer Bankers a package of equal value, then Pacific's position of ascendency exceeds even the priority at equal prices held to be anticompetitive in *International Salt*. This relationship is a factor over which an outsider such as American has no control, and with which it cannot hope to compete. It is a factor unrelated to traditional competitive elements such as product price, quality and marketability. It is an "irrelevant and alien factor" that, when allowed to intrude into the free marketplace, may produce an anticompetitive effect such as the antitrust laws were designed to combat.[20]

Appellees urge that our holding in *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*,[21] is to the contrary. In that case a liquor distributor that enjoyed an exclusive contract to distribute the products of the defendant distillers was terminated, and the distribution rights were contracted to another. Several of the defendant distillers were members of the multi-corporation "Seagram group." It was alleged by the plaintiff therein that defendants conspired to take his business away from him in violation of Section 1 of the Sherman Act. This court disagreed, holding that absent anticompetitive intent, termination of a dis-

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19. *See also, Northern Pac. R. Co. v. United States*, 356 U.S. 1 (1958).

20. *FTC v. Consolidated Foods Corp., supra* note 14.

21. 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062, *reh. denied*, 397 U.S. 1003 (1970).

tributor is a proper business option. We held that the alleged conspiracy, the negotiations between the several distillers and the new distributor, was designed merely to ascertain and insure that the proposed distribution system would be viable. We concluded that there was no unreasonable restraint of trade.

The *Seagram* case may, however, be distinguished from the case before us. In *Seagram* there was no breach of contract. An existing contract was simply allowed to expire. This is relevant to our determination in *Seagram* that traditional competitive factors led to the termination: there was no evidence suggesting that any factors other than traditional business considerations were weighed pursuant to reaching the decision to change distributors. Neither plaintiff therein nor the defendant distributor was a member of the Seagram corporate family. There was thus no suggestion that the termination was effected for the purpose of keeping the distribution business within the Seagram group. In *Seagram* we did not consider that issue.

The view of the evidence most favorable to appellants here suggests that Pacific had achieved a priority on Bankers' business as a result of its corporate affiliation with Bankers. An issue of fact is presented as to whether in breach of the American contract, the defendants intended to, or did, unreasonably restrain trade in violation of § 1 of the Sherman Act. *See United States v. Columbia Steel Co.*, 334 U.S. 495, 522, 527 (1948). In light of the existence of this factual issue, summary dismissal was improvidently granted.

Reversed, and remanded for further proceedings in accordance herewith.

Appendix D

Joseph L. Alioto
Maxwell M. Blecher
Harold R. Collins, Jr.
111 Sutter Street
San Francisco, California 94104
434-2100
Attorneys for Plaintiffs

In the United States District Court
for the Northern District of California

Original Filed Jul 15 1970
Clerk, U.S. Dist. Court San Francisco

Civil No. C-70-1509 OJC

DAVID DEVOTO and CHARLES F. VOLK,
Plaintiffs,

v.

PACIFIC FIDELITY LIFE INSURANCE COMPANY and BANKERS MORTGAGE COMPANY OF CALIFORNIA,
Defendants.

COMPLAINT

(Sherman Antitrust Act—Jury Demanded)

The above-named plaintiffs file this Complaint against the above-named defendants and, demanding trial by jury, complain and allege as follows:

COUNT ONE

I

JURISDICTION AND VENUE

1. This Complaint is filed and these proceedings are instituted against the named defendants under Section 4 of the Clayton Act (15 U.S.C. 15) to secure damages from the named defendants for violations of the antitrust laws as hereinafter alleged.

2. Each defendant transacts business and is found within the jurisdiction of this Court for the purpose of service. The interstate trade and commerce is carried on in part within the District of California.

II

THE PARTIES

3. Each plaintiff is a resident of the Northern District of California. Plaintiffs were prior to December 1, 1958, conducting business under the firm name and trade style of Market Placement Agency, in Petaluma, California. In or about December 1, 1968 the business and assets of Market Placement Agency were sold under an arrangement in which plaintiffs and each of them, jointly and severally, reserved the claims herein asserted. During the period that plaintiffs owned Market Placement Agency said company was in the business of writing and selling insurance of various kinds and descriptions on a commission basis.

4. Pacific Fidelity Life Insurance Company, a subsidiary of TransAmerica Corporation, is engaged in the business of selling life insurance throughout the United States and in California. Said company offers a broad portfolio of life insurance services and has operated in the past with an extremely rapid growth record. As of 1968 said com-

pany had in force more than one billion dollars worth of life insurance and ranks among the top ten per cent of all life insurance companies in the United States. Pacific Fidelity Life Insurance Company is a corporation existing under and by virtue of the laws of California and having its principal offices in Los Angeles, California.

5. Bankers Mortgage Company of California, a subsdiary of TransAmerica Corporation, is a corporation existing under and by virtue of the laws of the State of California and having its principal offices in San Francisco, California. Said company acquires and services individual mortgages primarily for large institutional investors. Said mortgages are secured by property located in the State of California and the lenders with whom Bankers Mortgage Company of California deals are located principally in the Eastern United States.

III

NATURE OF TRADE AND COMMERCE

6. In recent years the mortgage lending industry has adopted various programs of accident, health, and life insurance designed to protect their secured mortgage interest and to protect the mortgagee's ability to pay the indebtedness in the event of death, disability by illness or accident.

7. During the period of time covered by this complaint, Market Placement Agency was a commission agent for American Home Assurance Company, which, since 1893, has been one of the most respected and progressive insurance companies in the United States. American Home is licensed in each of the fifty states, District of Columbia, and Puerto Rico and does business in most countries of the free world. In recent years American Home Assurance Company has been extremely active in providing mortgage protection insurance.

8. In or about January 25, 1968 plaintiffs personally negotiated with defendant Bankers Mortgage Company of California, a contract, a copy of which is appended to the Complaint as Exhibit A.

9. The business of buying, selling and servicing mortgage protection assurance involves and substantially affects interstate commerce in that there is, and during the Complaint period was, a continuous exchange of moneys, credits, policies, correspondence and all other forms of commercial intercourse across state lines. Each of the parties hereto was, during the Complaint period engaged in said interstate commerce, and the restraints hereinafter alleged, directly involved and substantially affected such commerce.

IV
OFFENSES CHARGED

10. In or about June of 1968 Pacific Fidelity Insurance Company, ascertained the existence of the contract between American Home Assurance Company, which had been arranged by Market Placement Agency, and Bankers Mortgage Company of California. Thereafter, Pacific Fidelity Insurance Company, using its position as a subsidiary of TransAmerica, and acting in violation of the contractual interest of American Home Assurance Company and its agent, Market Placement Agency, undertook to and did secure a contract substantially similar with Bankers Mortgage Company of California, also a subsidiary of TransAmerica.

11. The acts hereinabove described in connection with the inducing the breach of contract attached as Exhibit A constituted a combination and conspiracy and restraint of trade and commerce in the business of selling mortgage

protection insurance in California in violation of Section 1 of the Sherman Act, and the contract between defendants itself violates Section 1 of the Sherman Act.

V
INJURY TO PLAINTIFF

12. As a result of the foregoing violation of the antitrust laws plaintiffs and each of them have been injured in that they have been deprived of profits they would otherwise have made and have sustained a loss in the value of their business. Plaintiffs estimate such damages to be in excess of One Hundred Forty Thousand Dollars ($140,000.00). When said sum has been more precisely ascertained plaintiffs will ask leave of Court to insert said amount herein.

COUNT TWO

1. Each of the allegations of paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of Count One are reasserted herein as though set forth in full.

2. The acts described in Paragraph 10 constitute an intentional interference with contractual relations and an inducement of a breach of contract.

WHEREFORE plaintiffs pray that the Court adjudge and decree:

1. That defendants and each of them have combined and conspired in violation of Section 1 of the Sherman Act;

2. That defendants and each of them have interfered with the contractual relationship of plaintiffs;

3. That plaintiffs recover treble the amount of their damages;

4. That plaintiffs be awarded reasonable attorneys' fees and costs of litigation as required by Section 4 of the Clayton Act; and

5. That plaintiffs have such other and further relief as may be deemed just and proper by this Court.

DATED: July 6, 1970

JOSEPH L. ALIOTO
MAXWELL M. BLECHER
HAROLD R. COLLINS, JR.
By HAROLD R. COLLINS
Attorneys for Plaintiffs

EXHIBIT A

MORTGAGE AGENCY AGREEMENT

THIS AGREEMENT, made and entered into, between THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, (a member of the American Home Group), with general offices at New York, New York, (hereinafter called the Company), and BANKERS MORTGAGE COMPANY OF CALIFORNIA (hereinafter called the Agent).

WITNESSETH: That for and in consideration of the mutual covenants and agreements hereinafter contained, the Company and the Agent hereby agree as follows:

1. The Company hereby appoints the Agent as its agent for the purpose of negotiating its Mortgage Protector plan of insurance 2681 as a special protection for certain Mortgages serviced by the Agent. The account number is 9905622.

2. The Company further authorizes said Agent to collect and receipt for premiums for said account. The Company agrees to pay cash, $1.25 for each eligible solicited mortgagor of Bankers Mortgage Company. This amount will be paid in two installments. The first installment will be based on one-half of the amount arrived at by multiplying the

total number of original names and addresses given to the Company by $1.25. The second installment will be adjusted to compensate for deletions. A deletion is defined as an individual who currently has a Mortgage A & H policy, or who is over 61 years of age, or who does not have an up to date address as furnished by Agent, which would enable receipt of solicitation materials.

The Company agrees to solicit all names and addresses furnished by Agent, to bear all costs of solicitation and underwriting, agrees not to solicit any of the mortgagors serviced by Agent for any other plan of insurance, and further agrees not to furnish any information concerning said mortgagors to any other individual or organization.

Commencing with the first month after the annual anniversary date of each individual policy issued as a result of the initial solicitation program, the Company will then pay monthly to Agent a flat commission of 25% of the net of all future written premiums as received. The term "Net written premium" is defined to mean gross written premiums less premiums returned to Insureds.

Accounts of money due the Company on the business covered by this Agreement are to be rendered monthly by the Agent so as to reach the Company's office not later than the 20th day of the following month. The balance shown to be due to the Company shall be remitted with this report.

3. The aforementioned commission and allowance, if any, shall be paid for the period beginning October 1, 1968 and ending October 1, 1970, and from year to year thereafter, so long as the insurance plan and this Agreement remain in force, except that in no event shall such commissions and allowances, if any, be payable for any period of year wherein (a) the Agent is not licensed as an agent or broker in the jurisdiction in which the said account is located, (b) the payment of such commission or allowance is

in violation of applicable statutory provisions and Insurance Department rulings representing commissions or licensing requirements.

The $1.25 cash payment referred to in paragraph 2 hereof shall pertain only to the initial solicitations of approximately 36,000 to 40,000 Mortgagors. With respect to future solicitations on whom a policy is issued, a commission of 25% of the net written premiums will be paid Agent for eligible Mortgagors which were not solicited during the initial solicitation.

Company and Agent agree, that additional solicitations may be made from time to time after those made during the first year hereof, and that such will be made at times mutually agreed upon. It shall be the intent of the parties that the Company shall be permitted to resolicit at least once during each succeeding year while this Agreement is in force, it being understood that Company will make no solicitations to Mortgagors who have been serviced by Agent less than one year, in order to permit solicitation by Agent of Agent's existing insurance plan to such new mortgagors.

4. The Agent shall have no authority to make any settlement or agreement regarding settlement of any claim or claims that may be made against said Company, unless specifically so authorized in writing; nor shall the Agent or any person appointed by the Agent have any authority to incur any expense or obligations of any kind or nature, in the name or on behalf of the Company without express written authority in each case; nor shall the Agent or any person appointed by the Agent have any authority to alter or discharge any policy contract or waive any policy provision or condition.

The Company shall see that the insurance policy to be issued and all advertising used in describing the coverage

provided shall first be submitted to the Agent for its approval before publication.

5. This Agreement will remain in force for a minimum of two years from the date stated in the third paragraph of this Agreement. After two years, this Agreement may be terminated by either party hereto upon thirty (30) days written notice to the other. Also, at any time, in the event of fraud or breach of any one of the conditions or provisions, or failure in performance of any duties by one of the parties to this Agreement, the other party may terminate this Agreement, or upon failure in compliance with any rule or regulation of the Company by the Agent, the Company may terminate, upon ten (10) days written notice by either party to the other.

The Agent shall not negotiate for or attempt to replace the insurance coverage written by the Company with another insurance carrier unless this Agreement is terminated by the Company or Agent has written consent of the Company.

6. Further, in the event of termination of this Agreement, for any reason, the Agent hereby agrees to continue to perform all the duties of Agent in connection herewith until such times as the premium written thereunder has been earned. These duties include, but are not limited to, the continued preparation of monthly reports, so as to reach the Company's office not later than the 20th day of the month following, covering any cancellations of insurance coverage extended before the termination of this Agreement, and to return to the Company, with such reports, the Agent's share of the return premium due thereon, if any, represented by any commissions paid.

7. No rights or interest arising hereunder shall be subject to assignment except with the written consent of the

Company. Any indebtedness of the Agent to the Company arising at any time shall constitute a first lien upon any commissions or allowances due or to become due hereunder.

8. The Company agrees to defend and hold Agent harmless from any claims and/or litigation arising from the solicitation of mortgagors, insurance policies issued, any and all claims made by mortgagors, whether or not legally justified.

Agent agrees to indemnify and save harmless the Company from any and all claims or losses caused by the negligent or wrongful acts of the Agent or by persons in the employ of the Agent.

In Witness Whereof, the parties hereto have executed this Agreement in duplicate on the day and year first above written.

AMERICAN HOME GROUP

By /s/ JOHN A. DVORAK
John A. Dvorak, Secretary

BANKERS MORTGAGE COMPANY
OF CALIFORNIA

By /s/ HAROLD GRANGER
Harold Granger
Title: Senior Vice President

Dated January 24th, 1968

Subject Index

Page

I

Opinions below 1

II

Questions presented 2

III

Statement of the case 3

A. Nature of the case and relevant proceedings below.. 3

B. The basic facts 5

(1) Parties 5

(2) The evidence 6

IV

Argument 20

A. Contrary to the petitioners' assertions, the decision below neither conflicts with decisions of other courts of appeals nor creates unsound new doctrine as to the antitrust significance of business dealings among affiliated corporations 21

B. Contrary to the petitioners' assertions the decision below does not conflict with other courts of appeals with respect to McCarran-Ferguson Act immunity... 23

C. The decision by the court below does not conflict with other courts of appeals on the question of standing to sue 24

D. If anything, the court below should have granted the motion for partial summary judgment by respondents DeVoto and Volk 26

Conclusion 27

Table of Authorities Cited

Cases	Pages
Continental Ore v. Union Carbide & Carbon, 370 U.S. 690	26
FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965) ...	22
International Salt Co. v. United States, 332 U.S. 392	27
Northern Pac. R. Co. v. United States, 356 U.S. 1	27
Perkins v. Standard Oil Co. of Calif., 395 U.S. 642	26
Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100	26

Rules	
Federal Rules of Civil Procedure:	
Rule 12	3
Rule 56	3, 4
United States Supreme Court Rules, Rule 19	20

Statutes	
Clayton Act (15 U.S.C. § 15) Section 4	3
Sherman Act (15 U.S.C. § 1) Section 1	3

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-232

PACIFIC FIDELITY LIFE INSURANCE CO. and BANKERS MORTGAGE COMPANY OF CALIFORNIA,
Petitioners,

vs.

DAVID DEVOTO and CHARLES F. VOLK,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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I

OPINIONS BELOW

The decision by the Court of Appeals is now reported at 516 F.2d 1 and is set out in Appendix C to the Petition. (Pet. App. C, pp. 23-32).

II

QUESTIONS PRESENTED

Contrary to the assertions by the petitioners Bankers Mortgage Company ("Bankers Mortgage") and Pacific Fidelity Life Insurance Co. ("Pacific Fidelity"), the questions presented are:

1. Whether, *as a matter of law,* a corporation is free to use its corporate affiliation with another corporation to coerce and pressure its affiliate into refusing to deal with "outside" corporations, or, at the very least, granting a discriminatory priority on the affiliate's business without regard to the traditional competitive elements such as price, quality and marketability.

2. Whether, *as a matter of law,* a combination and conspiracy between a noninsurance company and an insurance company to restrain and eliminate competition for the purchase of a list of potential insurance customers is immunized from antitrust liability by reason of the McCarran-Ferguson Act.

3. Whether, *as a matter of law,* an intended victim of an antitrust violation, who is injured in the precise manner that the antitrust violators contemplated, lacks standing to sue by reason of the fact that the victim lacks privity of contract with the antitrust violators.

III

STATEMENT OF THE CASE

A. NATURE OF THE CASE AND RELEVANT PROCEEDINGS BELOW

This is a private antitrust suit brought by respondents, DeVoto and Volk, doing business as Market Placement Agency, ("DeVoto and Volk"), under Section 4 of the Clayton Act (15 U.S.C. § 15) alleging injury by reason of the petitioners' violations of Section 1 of the Sherman Act. (15 U.S.C. § 1).

The complaint was filed by DeVoto and Volk on July 15, 1970. Bankers Mortgage and Pacific Fidelity filed a motion to dismiss the complaint under Rule 12 F.R.Civ.P. on September 1, 1970, alleging that (1) the complaint failed to state a cause of action, and (2) DeVoto and Volk lacked standing to sue. (R. 14 et seq.). The District Court denied the motion from the bench on December 4, 1970, (R. 422), and Bankers Mortgage and Pacific Fidelity filed their answers denying the allegations on December 14, 1970. (R. 81). On April 4, 1972, Bankers Mortgage and Pacific Fidelity, less than one month before trial, filed amended answers alleging that (1) their acts did not take place in nor did they affect interstate commerce, and (2) their acts were immunized under the McCarran-Ferguson Act. On April 18, 1972, Bankers Mortgage and Pacific Fidelity filed motions under Rule 56 F.R.Civ.P. for summary judgment alleging that: (1) no genuine issue of material fact existed as to whether or not their acts (a) indicated an anticompetitive motive, purpose or effect, or (b) were in or affected interstate commerce; (2) DeVoto and Volk lacked standing to sue; and (3) the conduct was immunized. (R. 231). On April 27, 1972, DeVoto and

Volk filed their opposition and, in addition, moved under Rule 56 F.R.Civ.P. for a partial summary judgment alleging that no genuine issue of fact existed on the issue of Bankers Mortgage's and Pacific Fidelity's liability by reason of their admission of liability and the undisputed facts demonstrating an anticompetitive motive, purpose and effect. (R. 320, 321). On January 29, 1973, the District Court granted the motion by Bankers Mortgage and Pacific Fidelity, and denied the motion by DeVoto and Volk. Although the District Court found that DeVoto and Volk had standing to sue and that the acts were not immunized, the District Court found as a matter of law that there was no triable issue of fact with respect to whether the acts of Bankers Mortgage and Pacific Fidelity: (1) were done with an anticompetitive motive, purpose, intent or had such an effect; or (2) were in or affected interstate commerce.[1] (Pet. App. A, pp. 1-10). The District Court found that, *as a matter of law,* the acts of Bankers Mortgage and Pacific Fidelity were done "for business reasons" and "for reasons of their own which are not relevant here." (Pet. App. A, pp. 8, 9). Judgment was entered on January 30, 1973, (R. 411), and DeVoto and Volk took an appeal. On January 16, 1975, the Court of Appeals reversed the District Court and held that a question of fact existed as to whether the acts of Bankers Mortgage and Pacific Fidelity manifested an anticompetitive purpose or effect, and that the acts affected interstate commerce. (Pet. App. B). The Court of Appeals did not originally rule upon the issues of standing and immunization, on the ground that, "These rulings are not before us on

[1]Bankers Mortgage and Pacific Fidelity do not raise the interstate commerce issue in their Petition.

company, Bankers has dealt exclusively with Pacific Fidelity with respect to mortgage protection insurance. Bankers had a written agreement for mortgage protection insurance in effect with Home Owners Group Agency until late 1964, the same time that Bankers became a Transamerica subsidiary. Homeowners Group Agency was not a subsidiary of Transamerica. In 1964, a new agreement was negotiated for mortgage protection insurance with Pacific Fidelity which was at that time a subsidiary of Transamerica Corporation. This agreement, renegotiated from time to time, continued in effect until September 1, 1970, when Pacific Fidelity was sold. (Granger, TR. 13; Ex. 1)[2].

In the winter of 1967 and spring of 1968, Pacific Fidelity offered two kinds of mortgage protection insurance programs to mortgage customers of Bankers. Pacific Fidelity's experience in selling mortgage protection insurance indicated that they could expect 3% of the mortgagors solicited[3] on one program and 1.5% of the mortgagors solicited on the other program. (Laity, TR. 30; Exs. 4 and 5).

In approximately October or November of 1967, Mr. Harold Granger of Bankers was contacted by Charles Volk with a new proposal for the solicitation and sale of mortgage protection insurance. This policy was one written by American Home Assurance Company and involved the selling of accident and health policies to Bankers'

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[2]The citations given, other than those referring to the Record or the Transcript, are from the depositions and the exhibits introduced and marked in the depositions. The depositions and exhibits contained therein are part of the Record on Appeal. (R. 416, 418).

[3]The percentage of mortgagors solicited who purchase insurance is known as "penetration."

mortgage accounts. American Home is and was an established insurance company with an excellent reputation in the field of providing mortgage protection insurance. The American Home Program was admittedly superior to Pacific Fidelity's Mortgage Protection Insurance Policy in that among other things, it provided for the mortgage customers a 25-year benefit term as opposed to a 3-year benefit term as provided for in Pacific Fidelity's policy. The American Home proposal also provided a unique benefit to Bankers in that American Home offered to pay Bankers $1.25 for each eligible mortgagor that was available for solicitation by American Home. The American Home proposal was a unique and promising business opportunity for Bankers because it offered a product different from anything that Pacific Fidelity had to offer and the $1.25 per eligible mortgagor guaranteed a fixed sum to Bankers which had not been guaranteed under the Pacific Fidelity programs. (Granger, Ex. 2; Colwell, Ex. 2; Colwell, TR. 17; Keller, TR. 18; Granger, TR. 21). Another advantageous feature of the American Home proposal was its very conservative estimate of 10% penetration (Granger, TR. 56, 57) as compared with Pacific Fidelity's past experience of from 1½ to 3 percent penetration. The contract contemplated that American Home would service the accounts from the East. (Granger, Ex. 18; Volk, TR. 10). Pursuant to the agency agreement between the appellants, in California, and American Home, in New York, the appellants were to receive for their services of bringing the two companies together a specified percentage of the revenues received by American Home. (DeVoto, TR. 24; Exhibit 2). Like the agreement between Bankers and American Home, the agreement between appellants and

American was for a minimum of 2 years. (DeVoto, Exhibit 2).

On November 17, 1967, American Home wrote Harold Granger of Bankers and put in writing the basic terms outlined to Granger by the appellants. (Granger, Ex. 2).

On November 21, 1967, Bankers' Kent Colwell acknowledged the letter stating that, "your proposal appears quite attractive to us." (Granger, Ex. 3). The offer was admittedly quite superior to any program previously offered by Pacific Fidelity to Bankers (Colwell, TR. 17-20) and Bankers looked, "forward to a long and mutually profitable relationship."

On December 5, American Home sent the agreement to Bankers Mortgage for their inspection.

On December 6, Granger of Bankers attached the agreement to a memorandum sent to Bankers' officers. The memorandum (Granger, Ex. 7) notes Granger's caution that the agreement with American Home may "result in some conflict with our present associates." The "associates" were identified as the petitioner Pacific Fidelity.

The American Home proposal was analyzed by Bankers and discussed in the Management Committee. (Colwell, TR. 22). Drafts of the American Home proposal were circulated to various Bankers personnel and submitted to the legal counsel for review. The American Home Plan underwent some revision in an effort to ensure that it would be compatible with the existing Pacific Fidelity solicitation programs. The Board of Directors of Bankers wished to allow Pacific Fidelity to have a continuing opportunity to solicit for the first year following commencement of loan servicing. (Granger, Ex. 7, 8, and 9). The

American Home contract in its final form was signed by representatives of American Home in New York and Bankers in California on January 24, 1968. (Granger, Ex. 18).

In the meantime, Bankers had kept Pacific Fidelity and other Transamerica personnel informed as to their negotiations with American Home. In November of 1967, Harold Granger of Bankers revealed the nature of the American Home proposal to representatives of Pacific Fidelity at a meeting in Los Angeles. (Laity, TR. 21, 22).

In addition, in December of 1967, Mr. Harold Granger of Bankers Mortgage sent copies of the American Home Accident and Health Policy, the American Home Mortgage Agency Agreement, and American Home advertising material to both Edward Michael of Occidental Life Insurance Company, a Transamerica subsidiary, and Robert Coan of Pacific Fidelity. (Granger, [illegible]0, 12). Occidental replied:

> "Occidental cannot match Am. Home offer, especially in view of second solicitation, Bill Dandy cannot see Am. Home penetration sufficient to match."

Neither was Pacific Fidelity able to match American Home's competitive offer. (Colwell, TR. 30).

On January 12, 1968, Harold Granger wrote to Robert Coan, Vice President of the Special Projects Division of Pacific Fidelity, informing him that Bankers was proceeding to enter into the agreement with American Home. (Granger, Ex. 14). Harold Granger wrote to Robert Coan again on January 24, 1968. The letter states that Bankers' primary objective in entering into the American Home

contract is to realize income for Bankers during the low cycle mortgage market year. (Granger, Ex. 17).

On January 19, 1968, an interoffice memorandum of Pacific Fidelity admits that its program for Bankers had not changed since 1964 when Bankers became a Transamerica affiliate and the two began to do business. Pacific further admits in the memo that their program for Bankers was "tired" and "passe" and that "it could undoubtedly be improved." (Mutschler, Ex. 3).

On January 29th, Pacific Fidelity continued to note difficulties with its own program. (Laity, Ex. 3). In that interoffice memorandum, Don Laity states that a number of mortgagors of Bankers had returned cancelled Pacific Fidelity policies and that "I anticipate a banner month for cancellations."

As the problems increased at Pacific, Pacific on February 1st asked Bankers to amend the existing agreement, and asked for approval by Bankers not to accept advance commissions. In this memo which highlights Pacific's performance, the petitioner Pacific even admitted that increasing the rates to mortgagors serviced by Bankers would not cure the Pacific's bad performance. (Mutschler, Ex. 4).

On March 27, 1968 the agreement between Bankers and American Home is executed. In the cover letter, Bankers' Granger states:

> "We . . . are confident that we shall have a long and mutually profitable relationship." (Granger, Ex. 21).

Although Bankers had already signed a contract with American Home, Pacific Fidelity undertook to prepare several studies designed to induce Bankers Mortgage Com-

pany to break its contract with American Home. One such study was prepared by Mutschler and sent to M. D. Laity on April 5, 1968. (Mutschler, Ex. 6). The Mutschler memorandum of April 5th, 1968 was prepared at the request of Mr. Laity who took this memorandum and condensed it for presentation to Mr. Boddiger, President of Pacific Fidelity Life. (Laity, TR. 29, 34; Laity, Ex. 5). The memo ends by requesting Laity "to determine to what degree Bankers is locked into a contract with American Home."

The second page of the Pacific Fidelity "Yield Comparison" lists four "other considerations." The first of these considerations states:

> "All profits for both PFLI and BMC coming out of our combined effort, stay within the Transamerica family."

This consideration is consistent with the reciprocal dealing principal of the Transamerica family that subsidiaries should keep business within the Transamerica Corporation wherever possible. (Colwell, TR. 13; Keller, TR. 10; Boddiger, TR. 12; Laity, TR. 35). The second consideration mentioned is:

> "PFLI has more than a pure business interest in Bankers Mortgage Company."

Mr. Laity of Pacific Fidelity testified that this additional consideration was the result of the affiliate relationship between Bankers Mortgage Company and Pacific Fidelity Life. (Laity, TR. 36; Boddiger, TR. 22; Granger, TR. 57; Keller, TR. 24).

The Pacific Fidelity "Yield Comparison" (Laity, Ex. 5) was then shown to Bankers in a meeting documented in a letter dated April 19, 1968 to Harold Granger from

M. D. Laity. (Laity, Ex. 6). Laity states in that memo, that in light of the "considerations":

> "[I]t doesn't seem to be in your or our best advantage to continue with them (American Home)."

Two weeks later, on April 30, 1968, Pacific's Laity again writes Bankers to ascertain what Bankers new president, Kent Colwell, thought of Pacific's "analysis" and "considerations":

> "Naturally we are very interested because we want to continue as your exclusive insurance marketers. . . ." (Granger, Ex. 25).

On May 8th, American Home, unaware of the conversations continuing between Pacific and Bankers, writes Bankers setting out American Home's past experience. American notes that a minimum of 10% of those mortgagors contacted would purchase insurance, and that a comparable mortgage banker company serviced by American resulted in affirmative responses from 17½% of those mortgagors solicited. (Granger, Ex. 17). [This compared to Pacific's 3% and 1½%.]

On May 21st, after an independent comparison between the American and Pacific programs, Bankers initially refused to break the signed contract with American. (Granger, Ex. 28). From its own self-interest, American's program was quite superior. Bankers wrote:

> "Because of our family connection, we have endeavored to review this as fairly as possible, exploring all the pros and cons, both within our own management and with our Board of Directors. We have concluded that we should not attempt to abrogate the agreement with American Home."

The important reasons for staying with American's competitive program were the approximately $50,000 commission advance under the American Home program, and Pacific Fidelity's poor penetration which the letter states is only 4.26% as compared with approximate 20% sale of other mortgage banking company insurance programs. Indeed, Bankers notes that if American,

> "does produce the results they anticipate, it could serve to sharpen our (Bankers) own competitive edge."

This was so in spite of the fact that preferential treatment is given to Transamerica or family members:

> "[W]hile it is our goal, insofar as possible, to keep business within the Transamerica family; there may, nevertheless, be situations in which introducing an outside factor can be beneficial."

Bankers had been gracious in changing agreements with Pacific to offset Pacific's poor past performances:

> "In turn, we hope you will be sympathetic at times to taking new looks at ways of doing things.
>
> • • •
>
> "I trust that you understand our position and that you will continue to work closely together for mutual benefit."

Just three days after Bankers detailed "explanation" to Pacific why American's program was so superior and why Bankers "should not attempt to abrogate" the American contract, Pacific convinced Bankers to send copies of all of the solicitation material supplied by American to Pacific Fidelity. (Granger, Ex. 29).

On May 28th, in a Pacific interoffice memo, Pacific outlines its plan to have Bankers breach its contract with American. (Laity, Ex. 10). The memo notes that Bankers, "still feel they should not abrogate their agreement with American." Pacific then proceeds simply to copy American's program:

> "This will put us in the position of duplicating the offer made to Bankers by American Home. . . ."

Although Bankers initially refused to abrogate the contract in spite of the expressed policy of keeping business within the Transamerica family wherever possible (Granger, Ex. 28), sometime between May 28, 1968 and June 21, 1968, Bankers decided to break the agreement with American Home and enter into a duplicative agreement with Pacific Fidelity Life. As stated by Mr. Granger, the only prerequisites Pacific Fidelity had to meet to give effect to the conspiracy to eliminate "outside" competition was (a) matching the American Home offer, and (b) providing Bankers Mortgage Company with a Hold Harmless Agreement. (Granger, TR. 64, 65). In fact Bankers assisted Pacific Fidelity in duplicating the American Home offer by providing Pacific Fidelity with copies of the American Home policy and the American Home solicitation materials. (Granger, Ex. 29). There was no benefit conferred on Bankers by reason of the conspiracy; to the contrary, Bankers knowingly incurred liability for the breach and jeopardized its reputation for keeping contracts. On the other hand, Pacific maintained its exclusivity, and the purpose of the conspiracy, to keep the business in the Transamerica "family" and exclude "outsiders" was accomplished by simply "matching" competition and holding Bankers harmless for its complicity in the conspiracy.

On June 21st, citing "pressure from above" (Granger, Ex. 26), Bankers notifies American that the contract will not be honored.

On June 25th, American tells the respondents that Bankers will not honor the signed contract:

> "Granger called today. I met with him and he said because of pressure from PF the deal is off. I've bought about two weeks time to try and collect thoughts and get back to him. Please advise next move. I'm rather uptight about what to do." (Granger, Ex. 30).

On July 2nd, Bankers and Pacific Fidelity plan the execution of the program. Bankers concludes its letter by stating:

> "In the meantime, there is still some fight left in the American Home people. I will keep you advised." (Granger, Ex. 31).

Pacific Fidelity Life program, designated 029, was copied directly from the American Home policy, the American Home solicitation materials, and incorporated the $1.25 per mortgagor commission advance of the American Home program. In actuality, even if all terms of both the American Home and Pacific Fidelity Plans were identical, it would be to Bankers' best interest to continue with American Home because both plans featured a 25% commission at the end of the first year, and this would result in more money for Bankers Mortgage Company because of American Home's higher projected penetration percentage.

On July 18th, Bankers memorializes the understanding between itself and Pacific Fidelity "based upon your matching the agreement we have with the American Home

Group." (Granger, Ex. 32). Bankers concludes by reminding Pacific of its promise:

> "[T]o indemnify and hold Bankers harmless against any expense which may be incurred by reason of our unilateral abrogation of the Mortgage Agency Agreement between Bankers and the American Home Group. We should like this indemnification in view of the indefinite knowledge we have concerning the reaction of the American Home Group and the Market Placement Agency [respondents] to this abrogation."

Bankers' insistence that Pacific Fidelity execute the Hold Harmless Agreement admits that Bankers knew that they were impairing the legal rights of both American Home and Market Placement Agency when they broke their contract with American Home. In fact when Pacific Fidelity requested permission of Bankers to go ahead with the program before the Hold Harmless Agreement was executed (Laity, Ex. 18). Mr. Granger did not wish Pacific Fidelity to continue with the program until the Hold Harmless Agreement had been executed. (Granger, TR. 75, 76).

In obtaining the Hold Harmless Agreement, Pacific's Laity wrote Pacific's chief executive officer and advised that although it was clear the contract was broken and that suit could be brought

> "The maximum award they could get would be the anticipated 2 year profits they expected." (Laity, Ex. 19).

In the same memo, Laity writes to his superior that it was Granger's opinion that American, although upset,

> "understood the situation, particularly since Pacific Fidelity Life was a Company affiliated with Bankers Mortgage and the Transamerica Corporation."

Pacific specifically notes the concern of the petitioners of, "the possibility of litigation being brought," by the respondents. *(ibid.)*

However, Laity argues that the probable damages from a lawsuit are offset by Pacific's maintenance of its exclusive control over the large market serviced by Bankers:

> "Quite frankly, our worst foreseeable loss could be the profits we earned from a 2 year period but we would still gain, due to the fact that we would retain the Bankers Mortgage Account which is a valuable one." (Laity, Ex. 19).

In the same memo, Pacific's chief executive officer agrees, and recommends that Laity prepare a letter of recision for Bankers to be approved by Transamerica Finance Corporation.

Bankers then prepared and sent a formal recision letter to Mr. Barrata of American Home on August 2, 1968. (Granger, Ex. 34). Pacific Fidelity also prepared a draft of a recision letter at the request of George Boddiger, President of Pacific Fidelity Life. (Laity, Ex. 19). The draft composed by Mr. Laity states in part:

> "We do regret any inconvenience caused you, but appreciate your understanding our wish to conduct this activity with our affiliated company, Pacific Fidelity Life, . . ." (Laity, Ex. 20).

The Laity recision letter was never sent. Instead on August 2nd, Bankers sent their own letter which admittedly concealed the fact that the decision to abrogate was not based on the merits of competition but rather on the fact of affiliation with Transamerica. (Granger, Ex. 34). As Pacific's Laity states regarding Granger's abrogation letter:

> "There are logical reasons outlined in Mr. Granger's letter for this decision, none of which point to any outside influences from either Pacific Fidelity or Transamerica Corporation." (Laity, Ex. 38, enclosure).

On the same date, Bankers expresses its concern to Pacific about respondents DeVoto and Volk:

> "[I]f we fail to complete our agreement with American Home for such amounts as they feel they would have earned under the agreement if we were to go ahead with it." (Granger, Ex. 35).

Sensing that Bankers may have second thoughts about their complicity in the abrogation, Pacific sends on August 7th, the signed Hold Harmless Agreement. This is conditioned on Bankers' agreement:

> "[T]hat no commitments, agreements, or actions will be made with American Home or Market Placement Agency [respondents] that involve the subject matter of this Hold Harmless Agreement." (Granger, Ex. 36.)

This being accomplished, Pacific then tries to change its obligations under the agreement with Bankers. (Granger, Ex. 38). Bankers responds on August 19 that,

> "[W]e had continuously assumed that the arrangement for the new plan would be identical."

and that:

> "As I told you, this was our principal incentive in cancelling with American Home and so inviting detrimental opinions concerning our integrity and possible litigation." (Granger, Ex. 39).

The agreement between Bankers Mortgage Company and American Home Assurance Company was to be in effect a minimum of two years. The Agreement was to be non-cancellable for two years, and after two years could be terminated by either party upon 30 days' written notice. The contract between Market Placement Agency and American Home provided that Market Placement Agency would receive commissions during the first two years and then the contract would be in effect from year to year thereafter so long as the insurance plan in question remained in effect. It was contemplated by all parties that the agreement would have a minimum duration of two years and would continue after the two year period developing into a long and profitable relationship.

IV

ARGUMENT

Notwithstanding the petitioners' distorted statement of the facts and tortured analysis of the law, the respondents respectfully submit that there is no reason consistent with Rule 19 of this Court to grant the petition; and accordingly, the petition should be denied.

A. CONTRARY TO THE PETITIONERS' ASSERTIONS, THE DECISION BELOW NEITHER CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS NOR CREATES UNSOUND NEW DOCTRINE AS TO THE ANTITRUST SIGNIFICANCE OF BUSINESS DEALINGS AMONG AFFILIATED CORPORATIONS.

The petitioners assert that all that is present in this case is one affiliate corporation doing business with another affiliate corporation. From that half truth, they argue that the Court below held that it was unlawful for affiliated corporations "without more" to do business with each other; and, therefore, according to the petitioners, the Court below has announced a rule of law that affiliation in and of itself creates antitrust liability. As is clearly evident from the recitation of the facts above, the petitioners, in reaching their premise, have either ignored or misstated basic material facts and in some cases have even fabricated facts of their own.

As pointed out above, the principal facts are:

1. DeVoto and Volk brought Bankers of California and American Home of New York together;

2. Bankers accepted American Home's offer, and signed a minimum two year contract;

3. Pacific Fidelity "pressured" Bankers into breaking its contract with American Home;

4. Bankers initially resisted out of its own self-interest and despite its "goal, insofar as possible, to keep business within the Transamerica family";

5. Bankers relented, and broke the contract;

6. The sole reason for breaking the contract was the use by Pacific Fidelity of mutual affiliation with Trans-

america, coercively applied and not for any competitive reason; and

7. Pacific Fidelity only had to "duplicate" or "match" American Home's offer, and sign a Hold Harmless Agreement with Bankers insulating Bankers from the anticipated litigation by American Home, DeVoto and Volk, or both.

Thus, the Court below noted:

> "The record clearly supports the contentions that: (1) the American package was superior to that finally offered by Pacific, and (2) Bankers based its decision to abrogate the American contract and to resume its exclusive relationship with Pacific upon its decision to keep the business . . . within the Transamerica corporate group." (Pet. App. C, pp. 29, 30).

This case gives rise to the inference, if not conclusively shows, that "one of the congeries of anticompetitive practices at which the antitrust laws are aimed", *FTC v. Consolidated Foods Corp.*, 380 U.S. 592, 594 (1965), was the sole basis for Pacific Fidelity successfully pressuring and coercing Bankers into breaching its contract with American Home. As such, the corporate affiliation between Bankers and Pacific Fidelity was:

> "'[A]n irrelevant and alien factor' intruding into the choice among competing products, creating at the least 'a priority on the business at equal prices'. *International Salt Co. v. United States,* 332 U.S. 392, 396-397." *FTC v. Consolidated Foods Corp., Supra.*

Petitioners argue that all that is present here is the exercise of a business decision. They argue, as they did in the District Court, that there is no question of fact.

Both Bankers and Pacific Fidelity were well aware that their combination to destroy the contract with American Home would injure DeVoto and Volk. Thus, when Bankers joined the combination with Pacific Fidelity, Bankers sought and received from Pacific Fidelity a Hold Harmless Agreement:

> "[I]n view of the indefinite knowledge we have concerning the reaction of the American Home Group and the Market Placement Agency [DeVoto and Völk's d/b/a designation] to this abrogation." (Granger, Ex. 32).

In justifying the Hold Harmless Agreement to his superior, Laity of Pacific Fidelity wrote that:

> "Mr. Granger [Bankers] was somewhat concerned about the possibility of litigation being brought against Bankers Mortgage by the Market Placement Agency." (Laity, Ex. 19).

Pacific Fidelity then reasoned that the Hold Harmless Agreement insulating Bankers from the anticipated litigation was worth the maintenance of its exclusive with Bankers:

> "Quite frankly, our worst foreseeable loss could be the profit we earned from a 2 year period but we would still gain, due to the fact that we would retain the Bankers Mortgage Account which is a valuable one." (Laity, Ex. 19).

Bankers then sent the Hold Harmless Agreement to Pacific Fidelity, noting its concern that DeVoto and Volk would probably sue, even if American Home would not:

> "[I]f we fail to complete our agreement with American Home for such amounts as they [DeVoto and Volk] would have earned under the agreement if we were to go ahead with it." (Granger, Ex. 35).

Pacific Fidelity executed the agreement and cautioned Bankers that:

> "[W]e wish to be sure it is understood by Bankers Mortgage that no commitments, agreements, or actions will be made with American Home Assurance Company or Market Placement Agency that involve the subject matter of this Hold Harmless Agreement." (Granger, Ex. 26).

There can be little doubt that, as a matter of fact, the petitioners knew that their conduct would directly injure the respondents. On this point, this Court has spoken often. See, *Perkins v. Standard Oil Co. of Calif.*, 395 U.S. 642; *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100; *Continental Ore v. Union Carbide & Carbon*, 370 U.S. 690.

The most that petitioners can do on this issue is to engage in a semantical argument about a so called "target area" test and a "direct injury" test. Petitioners then go on to argue from rather thin circumstance. Under either analysis, the respondents here were both in the "target area" and the victims of "direct injury."

D. IF ANYTHING, THE COURT BELOW SHOULD HAVE GRANTED THE MOTION FOR PARTIAL SUMMARY JUDGMENT BY RESPONDENTS DeVOTO AND VOLK.

DeVoto and Volk moved the District Court for partial summary judgment on the ground that the undisputed facts, mostly those admitted by Pacific Fidelity and Bankers Mortgage, showed that the petitioners purposely

engaged in anticompetitive conduct and knew that their acts constituted a restraint trade. DeVoto and Volk relied upon this Court's decisions in *International Salt Co. v. United States,* 332 U.S. 392 and *Northern Pac. R. Co. v. United States,* 356 U.S. 1. In those cases this Court granted summary judgment in favor of the antitrust plaintiff on the ground that the activity complained of violated the antitrust laws, as a matter of law. In each case priorities were granted to the defendants by reason of "irrelevant and alien factors" which intruded into the free market place.

Thus, if any error was committed below, it was that the lower courts failed to grant a partial summary judgment in favor of the respondents DeVoto and Volk. The lower courts should have held that the petitioners conduct violated the antitrust laws, as a matter of law, and then should have remanded for trial the issue of the amount of damages.

CONCLUSION

For the reasons stated, respondents respectfully submit that the petition and writ of certiorari should be denied.

Dated, San Francisco, California,
September 12, 1975.

Respectfully submitted,
JOSEPH M. ALIOTO,
Counsel for Respondents.

LAW OFFICES OF JOSEPH L. ALIOTO,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

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Petitioners,

v.

DAVID DEVOTO and CHARLES F. VOLK,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners' Reply Brief

JAMES R. MADISON
600 Montgomery Street
San Francisco, CA 94111
Counsel for Petitioners

ORRICK, HERRINGTON, ROWLEY & SUTCLIFFE
WILLIAM F. ALDERMAN
ROBERT P. FEYER
600 Montgomery Street
San Francisco, CA 94111
Of Counsel for Petitioners

October 6, 1975

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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Petitioners' Reply Brief

Respondents' brief in opposition neither disputes petitioners' analysis of the three substantial legal issues presented by the petition nor addresses the conflicts among the circuits on those issues. Instead, respondents rest their opposition to the petition entirely upon the contention that

petitioners have "misstated," "fabricated," "converted," "distorted," "ignored" and "avoided" the facts.[1]

Respondents not only implicitly concede the validity of petitioners' analysis of the three legal issues before the Court. Their version of the facts also emphasizes how clearly those important issues are presented by this case. Petitioners do not dispute that the seven "principal facts" on which respondents rely at pages 21-22 of their brief are consistent with a commonplace tortious interference with contract. But the only anticompetitive purpose or effect urged by respondents to convert a tortious interference case into a violation of the Sherman Act[2] is the corporate affiliation between petitioners, and their alleged desire to keep the business of mortgage protection insurance within the Transamerica corporate family.

Petitioners' argument is not, as respondents would have it, that "all that is present here is the exercise of a business decision."[3] The pivotal issue is whether a tortious

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1. pp. 5, 20, 21, 23, 24. Respondents have not cited a single such fact in support of their accusation. Indeed, the "principal facts" on which respondents rely at pages 21-22 of their brief are candidly set forth at pages 6-7 of the petition. In contrast, respondents' 16-page statement headed "The Basic Facts" is replete with allegations which (1) appear nowhere in the record, *i.e.*, that Bankers kept Transamerica personnel informed of its negotiations with Bankers (p. 10) and that American's estimate of 10% penetration was "very conservative" (p. 8); and (2) distort the record, *e.g.*, the citation of facts relating to loss experience only as indicative of Pacific's "performance" (p. 11) and the suggestion that Pacific's 3% penetration on an old insurance program is comparable to its expectations on a new "admittedly superior" program (p. 8).

2. This action was not filed until after expiration of the two-year period of limitations on a tortious interference claim, as set forth in California Code of Civil Procedure section 339(1). Respondents claim that the tort occurred on and before June 25, 1968 (Brief in Opp. at 16). The complaint was filed on July 15, 1970 (Appendix D to the Petition at 33).

3. Brief in Opp. at 22.

interference violates the Sherman Act where it is directed at the relationship between an affiliate and an outside competitor.[4] That is the issue to which pages 8-14 of the petition are directed. And that is an issue on which the brief in opposition is utterly devoid of analysis.

Respondents also seek to divert attention from the McCarran Act issue by arguing that their factual contentions do not support the position they attribute to petitioners. Petitioners' McCarran argument, however, is not that "insurance companies are *ipso facto* immune from the antitrust laws or that the mere presence of an insurance company in a conspiracy to restrain trade immunizes all the other participants in the conspiracy."[5] The trade involved in this case was the sale of insurance by competing insurance companies, and the important McCarran issue is whether an alleged conspiracy to restrain such trade is within the "business of insurance." Respondents ignore that issue altogether, cite no cases, and pay no heed to the Court's opinion in *National Securities*.[6]

Likewise on the standing issue, respondents sidestep the conflict between the decision below and decisions of courts of appeals in the First, Second, Third, Sixth and Tenth Circuits on similar facts. They specifically ignore the contrary result in the First Circuit on a virtually identical claim by an insurance agent for alleged lost commissions.[7] The Court's decisions relied on by respondents are not in

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4. Brief in Opp. at 23.

5. Brief in Opp. at 24.

6. *Securities and Exchange Commission v. National Securities, Inc.*, 393 U.S. 453, 89 S.Ct. 564 (1968).

7. *Miley v. John Hancock Mutual Life Ins. Co.*, 148 F.Supp. 299 (D. Mass. 1957), *aff'd per curiam*, 242 F.2d 758 (1st Cir. 1957), *cert. denied*, 355 U.S. 828, 78 S.Ct. 38 (1957).

point, as none involved a claim of injury suffered by reason of a relationship with a competitor of defendant.

Respondents' transparent attempt to divert attention from the substantial issues raised by this petition is persuasive evidence of respondents' inability to defend the decision below. Neither the importance of the issues nor the conflict among the circuits on each of them is disputed by the brief in opposition. On the contrary, respondents have merely underscored the propriety of review by the Court of the three basic and recurring antitrust issues presented by the petition.

Respectfully submitted,

JAMES R. MADISON
600 Montgomery Street
San Francisco, CA 94111
Counsel for Petitioners

ORRICK, HERRINGTON, ROWLEY & SUTCLIFFE
WILLIAM F. ALDERMAN
ROBERT P. FEYER
600 Montgomery Street
San Francisco, CA 94111
Of Counsel for Petitioners

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